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Supreme Court, U.S.
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No. 061425

IN THE

SUPREME COURT OF THE UNITED STATES

DELANEY E, SMITH JR.,M.D. *PRO SE*

PETITIONER

v.

LOS ANGELES METROPOLITAN TRANSIT AUTHORITY,
HERTZ CLAIM MANAGEMENT CORPORATION, ET. AL.

PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

DELANEY E. SMITH JR.,M.D.
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QUESTIONS PRESENTED

(1.) Whether, ***United States Constitution Article III section 2.,*** extends **subject matter jurisdiction** for the United States Court of Appeals, and District courts to make rulings, in state workers compensation law related cases that have been removed to District court in violation of *28 U.S.C. section 1445 (c)*, or should all such cases be remanded to the court from which it was removed, as statue appears to read.

(2.) Whether, rights when based upon **subject matter jurisdiction** defense can be waived, when civil case is state workers compensation law related, and protected from removal under *28 U.S.C. sec. 1445 (c);* thereby creating jurisdictional authority for District/ Appeals Courts to rule on merits of case.

PARTIES TO THE PROCEEDINGS

Petitioner is Delaney E. Smith Jr. Pharm.D.,M.D., proceeding pro se [Supreme Court Rule 33.2(a)]

Respondents are the employer Los Angeles Metropolitan Transit Authority, and it's workers compensation third party administrators and or insurers, and agents, Hertz Claim Management Corporation; Presidium Inc. Cambdridge Integrated Services, Travelers Indemnity; Travelers Indemnity Company of Illinois; Constitution State Services Co., Affordable Medical Network/ First Health Corp. and AON Corporation

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***References to Appeal all relate to Amended Appeal filed and accepted by Ninth Circuit Court of Appeals.**

Petition for Writ of Certiorari

Petitioner Delaney E. Smith Jr.,M.D., respectfully petitions for a writ of certiorari to review the judgement of the United States Court of Appeals for the Ninth Circuit Case No. 05-055370 and Los Angeles District Court for the Central District of California - Western Division, Case No. CV-00-05986-NM (CWx) .

Opinions Below

The opinion and denials of Petitions For Rehearing by the U.S. Ninth Circuit Court of Appeals in this case are unreported and reproduced in the Appendix
The opinions of the District Court are unreported and are reproduced in the Appendix at App. 2a + 10a .

National Importance

The rulings of the **United States Supreme Court** in this case are of national importance and there is great urgency, in that the "jurisprudence" of Ninth Circuit pertinent to "non-removable cases" , and forum selection protection, provided under **Title 28 U.S.C. section 1445(c)**, contravenes this statue, and conflicts with other U.S. Circuit Appeal Court rulings, including but not limited to the...Third, Fourth, Fifth, Sixth, Seventh, Eighth... U.S. Circuit Courts of Appeal, and done so with great waste to the tax payers of the United States of America.

Additionally, the rulings by the Ninth Circuit Judicial Panel of Farris, Boochever, and Leavy contradict prior rulings of the State of California Supreme Court, the State of California Workers Compensation Appeals Court, and... even their own past rulings as set forth herein. The rulings of other Circuit Courts also contradict the rulings of one another pertinent to **28 U.S.C. section 1445 (c)**, thereby necessitating a clear, and unequivocal ruling by the United States Supreme Court as set forth herein.

Jurisdictional Authority of the Supreme Court

The Memorandum of the United States Court of Appeals for the Ninth District was filed in this case on August 4, 2006.Document entitled Petition For Rehearing (FRAP 40); With Request to Vacate All Rulings and Judgements, and to Remand to Superior Court, and For Appellate Commissioner to Award All Available Sanctions (including Sanctions for Appellees Failure to Send Notification of Their Decision Not to Respond to Appeal) **[Lack of Subject Matter Jurisdiction]**, was timely filed via U.S. express mail on August 17, 2006, and filed by the Appeals court on August 21, 2006 with grant for extension of filing at that time. The court did not address the issue of **lack of subject matter jurisdiction,** before denying the petition. The same Petition for Rehearing etc... included a Petition for Hearing En Banc and was denied by the Court on September 15, 2006. The Petition for writ of certiorari was timely mailed on December 11, 2006, under *28 U.S.C. sec. 2101 (c); Supreme Court 13.1 (2).*, but was returned, by the Clerk with a 60 day extension in that inadvertantly, no check was enclosed, and format the was not correct.

"The time for filing the certiorari petition begins running anew from the date rehearing is denied..... **[Supreme Court rule 13.3; Hibbs v. Winn, 54c2 U.S. 88, 97-98, 124 S. Ct. 2276, 2283-2284 (2004).**

Document entitled, **Petition For Full Court Hearing – Lack of Subject Matter Jurisdiction to Rule on Merits; Failure to Rule on Appellate Issues; Alternatively Request for Certification of Orders and Appellants Filings For Certiorari Appeal [U.S.C. sec. 1445 (c)] with Request for Judicial Notice Attachments A and B [under General Order 5.8.a],** was timely filed via United States overnignt mail on September 28, 2`06, and filed by the court on September 29, 2006. The Ninth Circuit court did not address the issue of lack of subject matter jurisdiction, before denying the petition. The Petition was denied by the Court on October 30, 2006.

Document entitled **Addendum to Petition for Full Court Hearing; Lack of Subject Matter Jurisdiction to Rule on Merits; Failure to Rule on Appellate Issues: Alternatively, Request for Certification of Orders and Appellant's Filings For Certiorari Appeal [28 U.S.C. sec 1445 (c)]** was filed via U.S. express mail on October 19, 2006., and filed by the court of Appeals on October 20, 2006. The document was returned by the clerk with the instructions that it must be resubmitted within 60 days, when the filing cost of $300.00 inadvertantly was not included. The format has been revised,

Subject Matter Jurisdiction can be raised at anytime during the Appeals process, and the **Petition for Rehear-**

ing and Petition for Full Court Review opened the question of Lack of Subject Matter Jurisdiction, which the court had an obligation to review before the dismissal. The Ninth Circuit had previously found that lack of subject matter jurisdiction is never waived and may be raised at any time by either party or by the court.

See Attorneys Trust v. Videotape Computer Products, Inc 93 F. 3d 593-95 (9th Cir. 1996). Because it affects the court's very power to adjudicate, delay in raising lack of subject matter jurisdiction does not waive ground. The objection can be raised initially at trial, or even on appeal. **[FRCP 12 (h)(3)]**

The rulings of the district/ appeals court are a legal nullity, in that a decision reached without jurisdiction is a legal nullity, and therefore "not a decision at all. The jurisdictional defect prevents the defective decision from ever becoming final. **See Watts v. Pickney, 752 F 2d 406, 409 (9th Cir. 1986) decision reached by district court lacking jurisdiction is "void" for purposes of *Fed. R. Civ.P 60 (b)(4).***

United States Supreme Court has the jurisdictional authority to determine jurisdiction of inferior courts. Whether, case should have been remanded to the state court from which it was removed, upon determination by District/ Appellate courts that they lacked jurisdictional authority to adjudicate state of California workers compensation law related causes of action is within the jurisdictional authority of the **United States Supreme**

Court. The **Supreme court** has found that, if the record discloses that the lower court was without jurisdiction this court will notice the defect, even if the parties make no contention concerning it.. When the lower court lack[s] jurisdiction, the Supreme court has jurisdiction on appeal, not of the merits but merely for the purpose of correcting the error of the lower court in entertaining the suit." **See - United States v. Corrick, 298 U.S. 435, 440 [56 S. Ct. 829, 831, 80 L.d. 1263] (1936) . Arizonians for Official English v. Arizona, 520 U.S. 43, 73, 117, S. Ct. 1055, 1071-1072, 137 L.Ed.2d 170 (1997), Also see Bender, v. Willamsport Arena School Dist., 475 U.S. 534, 541, 106, S. Ct. 1326, 1331, 89 L.Ed.2d 501 (1986) (brakets in original) See -Steel Co. v. Citizens For A Better Environment 118 S. Ct. 1003, 1013, (1998).**

ADDITIONAL GROUNDS FOR U.S. SUPREME COURT JURISDICTION:

The ruling of the Ninth Ciricuit, contradicts earlier rulings of the State of California Supreme Court as well as U.S. Court of Appeals rulings in other Circuits as set forth above. Under Rule 10 (a) the Supreme Court may consider cases in which, a United States court of appeals has entered a decision in conflict with the decision of another United States Court of Appeals on the same important matter; has decided an important federal question in a way that conflicts with a state court of last resort.

Case Presently Before U.S. Supreme Court Is Unique

Unlike the plaintiff medical groups in the California

Supreme court case Vacanti v. State Compensation Insurance Fund, the petitioner in the case that is presently before this court, submitted some of the same issues that had been filed in state court [Superior Court]; and were later reviewed in Federal Court, to the State of California Workers Compensation Appeals Court [WCAB] for review. The related opinion of WCAB judge Pamela Faust was attached to the Second Amended Complaint as Exhibit 20, and to the Appeal filed at the U.S. Court of Appeals as ER 331-336. Thus it can be seen that prior to most of the rulings of the federal court the WCAB judge had already ruled on the matter of MTA's Laches argument, and the judge set forth the reasons in her opinion that "said claim is not barred by the doctrine of laches or equitable estoppel" which was later contradicted by the ruling of federal court judge Manela.

Outside of the state Superior Court from which it was removed, the United States Supreme Court is the only forum, available to the Petitioners because it is the only federal court that can review the particulars of this case, because the District court and U.S. court of Appeals have limited jurisdiction that do not allow them to review or weigh the decisions of a state appeals court [WCAB]. Federal district courts may exercise only original jurisdiction, they may not exercise appellate jurisdiction over state court decisions. **See District of Columbia Court of Appeals v. Feldman, 460 U.S. 462, 482-86, 75 L. Ed. 2d 206, 103 S. Ct. 1303 (1983); Rooker v. Fidelity Trust Co., 263 U.S. 413, 415 – 16, 68 L.Ed. 362, 44 S. Ct. 149 (1923).**

The **United States Supreme court** has exclusive

jurisdiction to review state appellate [WCAB] decisions. Feldman, 460 U.S. at 486; also see 28 U.S.C. sec. 1257. The case presently before the U.S. Supreme Court is one in which the Ninth Circuit Panel of Browning, Farris , and Leavy... directly contradict themselves, and the Panel of Farris, Boochever, and Leavy in that they earlier ruled that because the resolution of the claims at issue would require a review of the merits of the WCAB's and the state court's decision, the district court did not err by concluding that it lacked subject-matter jurisdiction over the claims. The Appeals court cited **Feldman. 460 U.S. at 484-86; Mc Nair, 805 F. 2d at 892-93**.[Leonard *Sherman, Plaintiff-Appellant v. Joan D. Berlin, d/b/a JDB Properties et. al.*] U.S. Appeals Court No. 94-55441 filed October 6, 1994.] (unpublished)

The case presently before the Supreme court is one in which following removal, both the plaintiffs and defendants repeatedly advised the court that it lacked jurisdictional authority over the case. The District court even acknowledged it's lack of jurisdictional authority, but then failed to remand, but chose instead to dismiss those causes of action "with prejudice".

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. United States Constitution Article III section provides that the judicial power of the United States is vested in the Supreme Court, "and such inferior Courts as the Congress may from time to time ordain and establish" Congress therefore confers jurisdiction upon federal district courts, as limited by **U.S. Constitution**

Article III section 2., See *Ankenbrandt v. Richards*, 504, U.S. 689. 697-99, 112 S. Ct. 2206, 2212 (1992).

2. **Title 28 U.S.C. section 1445 (c)** provides that a civil action in any state court arising under workers compensation laws of such state may not be removed to any district court in the United States.

STATEMENT

Petitioner seeks review of the Ninth Circuit Court ruling which in addressing petitioner's Appeal that was based upon Lack of Subject Matter Jurisdiction, and 28 U.S.C sec. 1445 (c), the Appeals court cited ***Vasquez v. North County Transit District.*, 292 F. 3d 1049, 1061, (9th Cir. 2002)** and held that.. Moreover, Smith failed to timely object to removal and thus waived any objection on that basis. The court also ruled that even if sec. **1445 (c)** otherwise applies here, it's bar against removal of workers compensation claims is nonjurisdictional and may be waived". See Appeals Court Memorandum p. 3 . **The latter of which is the primary issue before the Supreme court, though the court is reminded that the petitioner also contends that the initial motion for remand was timely filed within 30 days of receipt of notice of removal as set forth herein.**

Petitioner seeks review of the Ninth Circuit Court of Appeals ruling because it is in conflict with the rulings of the State of California Supreme Court in **Vacanti v. State Compensation Insurance Fund** et. al., which identifies the State of California Workers Compensation Appeals court as having the exclusive right to make jurisdictional determinations pertinent to state of California workers

compensation law related cases. **See California Supreme Court No. BC116099, Filed January 4, 2001; Court of Appeals 2/5 Los Angeles County No. B114190.** Accordingly the District/ Appeals court had no jurfisdictional authority to dismiss any causes of action from the complaint, or to make any decisions in the case except for the decision to remand.

Petitioner seeks review of the Ninth Circuit Court of Appeals rulings because it is conflict with federal statue **Title 28 U.S.C. section 1445 (c).** Petitioner seeks review of the Ninth Circuit Court of Appeals ruling because it is in conflict with rulings of State of California Workers Court of Appeals [WCAB]; State of California statues and regulations as set forth herein.

Petioner seeks review of Ninth Circuit Court of Appeals ruling because it is conflict with it's own prior rulings, in that the Ninth Circuit has ruled that, jurisdictional Issues are generally not waivable. The court went on to explain that consequently, parties can ordinarily challenge both district court's and the Ninth Circuit's jurisdiction at any time during the appeal process. **See- [California ex rei. Sacramento Metro. Air Quality Mgt. Dist. v. United States 215 F3d 1005, 1009 (9th Cir. 2000)].** Simularly in other cases the Ninth circuit has previously ruled that jurisdiction over an appeal is open to challenge at any time, and that a party cannot waive it's right to challenge the appellate court's jurisdiction. **[Fiester v. Turner, 783 F2d 1474, 1475 (9th Cir. 1986); also see Miller v. Marriott Intl, Inc., 300 F 3d 1061, 1063 (9th Cir. 2002).**

The Employer Los Angeles MTA, and it's agents acting

as it's workers compensation third party administrators, reinsurer, and or as a PPO Network, took PPO deductions illegally from medical providers, and or hospitals who treated injured workers, in that they were not authorized Adminstrative Director approved, workers compensation Healthcare Organizations (HCO.s) as required under **Title 8 Cal. Code of Reg. 9770, 9771.** The Appellees, each of them, had made, or recommended the making payments for medical services rendered, below those established and required in the State of California Industrial Fee Schedule, which was never disputed. **See labor code sec, 4609.[Appeal p.31].**

Additionally, in the instant case, after referring employees to the petitioner for treatment, the Employer [MTA] oftentimes failed to pay any portion of the medical bills for many years and then failed to pay 10% penalty and 10% per annum interest as required under ***labor code section 4603.2,*** **and** ***Title California Code of Regulations 9792.5.*** It is through these acts and various other acts that MTA and it's contractors engaged in State of California workers compensation related faud, as set forth in the Original Complaint filed in state court. In a scheme to avoid paying employee benefits. which included the payment of medical bills, in 1998 MTA claimed it was no longer "self insured" and that it's workers compensation program was "fully insured by Travelers". Travelers later denied MTA's claim in it's Admissions, contradicting the MTA's Admissions, which under federal law was enough by itself to defeat related Motion for Summary Judgment.**[See Appeal p. 29-33]**

Additionally, the case involved the fraudulent award of

workers compensation related contracts, judicially forced arbitration with respondent First Health without a hearing, to determine the parties, and related threats of case dismissal for failure to arbitrate. District court lacked jurisdictional authority, over arbitration matters that require state law for adjudication **[California Code of Civil Procedure, Title 9, section 1280 et. seq.]** as set forth in the workers compensation related [Occupational Urgent Care Healthcare "OUCH" (later known as First Health) sec. 10.3] contract between the parties, attached to the **Original Complaint [ER 138, 159]; and the Second Amended Complaint [ER 272].**

A third party to the case, the mediator who was himself a retired judge told Dr. Smith that he should settle the case for $100,000.00 offered by MTA, and $30,000.00 offered by each of the defendants... because the petitioner Dr. Smith "had been a victim of MTA corruption, to a greater extent than racial discrimination", and that the District court judge Nora Manella had no intention of allowing the case to go to trial. Petitioner, Dr. Smith requested her self recusal, a protection provided under **28 USC sec. 455 (a)**, but in violation of the statue, the judge refused "self recusal" when a second district court judge ....Judge Lew intervened on her behalf...thereby interfering with, and providing an avenue by which she circumvented the "self recusal" process. Interference in the self recusal process, is the standard of practice in the Los Angeles district, in that Judge Lew's clerk explained to Dr. Smith that ..."self recusals do not occur in this court"????

Although **28 U.S.C section 455 (a)** is stated in terms of

a judge's self-enforcing obligation, it may be invoked by a party. **See [*In re Manoa Finance Co. Inc.*, 781 F2d 1370, 1373, 9th Cir.1986)]** In still another case Dr. Smith had requested the self recusal of Judge Lew under **455 (a).** However, consistent with his clerk's claim, Judge Lew failed to recuse himself, and the self recusal process was ultimately interupted by another judge. The related case U.S Court of Appeals Docket Number CV 06-03918-RSW, had been removed to federal court from Superior court in Monterey Park, California by petitoner Dr. Smith.

Instead of recusing himself, as requested by Petitioner Dr. Smith in that case, because of his perception of past judicial improprieties, in the MTA case, presently before the U.S. Supreme Court ... judge Lew ignored the petition for recusal entitled Notice of and Motion for Reconsideration of, Order Denying Motion to Remove and Remanding to State Court; Request for Self Recusal of District Court Judge Ronald S.W. Lew [Re: Forfeiture of Superior Court's Subject Matter Jurisdiction –Failure to Rule], filed in District Court on August 28, 2006, and he remanded the case on September 5, 2006, according to the court's docket. [but unsuccessfully]

Judge Lew.'s remand effort to Superior court in that particular case failed. After first misidentifying guardian and grandparent Dr. Smith as a... defendant, rather than Plaintiff... a misrepresentation that was reflected throughout the Court Docket... in his haste, to rid himself of that case the district court mailed the remand related documents to the... wrong Superior Court, which then returned the case to federal court [jugde Lew] at about the same time that an Appeal was being filed with the U.S. Court of Appeals.[Related documemtents available.]

Now, pertinent to the case that is presently before this court, in confirmation of the petitioner's perception of impropriety, Judge Manella refused to remand the case, even though several Motions for Remand based upon lack of subject matter jurisdiction were filed by the petitioner, and the issue of lack of subject matter jurisdiction was at times even raised by the Appellees, each of them, for purpose of having "causes of action" dismissed with prejudice, which was eventually granted.

Ultimately, judge Manella would award the Respondents Motions for Summary Judgement, even though their filed Statements of Undisputed Facts were so badly flawed, that the clerk stamped them as "not used", and they were not entered into the record. Judge Manella is no longer a judge in the federal system. The Appeals court failed to rule on the issues presented in the Appeal that were raised by judge Manella's rulings. Instead of ruling on the issues, identified in the Appeal, ...the U.S. Appeals Court ruled on the merits of the case, but pertinent to only one Appellee, the MTA ...while failing to make rulings pertinent to the other Appellees. The Appeals Court ruling suggested that violations of federal statue sec. 1445 (c), created "procedural" defects that are "nonjurisdictional". The U.S. Appeals court did not explain how it arrived at the conclusion that "Smith failed to timely object to removal...".

The initial Motion for Remand was timely filed, for Dr. Smith by his attorney Robert Ramsey Jr. To the contrary the MTA's Motion for remand was served late on Petitioner/ Plaintiffs. Petitioner's Original Summons and Complaint was served on the MTA [removing party] on

May 5, 2000. MTA's Motion for Removal was filed on June 2, 2000 but MTA failed to serve the Petitioner or Plaintiffs in the case, or to include them on the servce list. The court is reminded that in removals based upon a "federal question as in this case, there is no 30 day requirement to file Motion for Remand. There were several subsequent Motions for Remand,each of them, was based based upon "lack of subject matter jurisdiction", for which there is no 30 day limitation.

Removing party' [MTA's] Proof of Service on Notice of Removal of Action under 28 U.S.C. sec. 1441 (b) (Federal Question) was served on the Plaintiffs late [not until June 30, 2000]. [See Appeal ER 449; and Court docket # 12- ER 448]. Petitioner's response, while it might have appeared to have been filed late, a careful review reveals that Petioner's Notice of Motion and Motion to Remand to State Court, Request for Sanctions was timely filed on Monday July 31, 2000 [within 30 days of being served with removal notice]**.[See docket # 25-ER 448]** Once the Petitioner / Plaintiffs were finally served, MTA had an obligation to file a new Notice of Removal, on all parties in that the earlier Notice of Removal was void, in that it had not been served on the Petitioner/ plaintiffs prior to filing the document with the court, and of course any such later filing for removal would have been untimely. Confirmation of the late service on Petitoner /Plaintiffs can be found in District Court Docket #12. Additionally, the MTA failed to identify the alleged "federal question". Review of the Original Complaint revealed that no "federal question" was raised by Petitioners/Plaintiffs in the 128 allegations of Complaint, a requisite for federal jurisdiction.**[see-Appeal p 12.]**

Additionally, the removal was in violation of **28 U.S.C sec. 1445 (c)**, which prohibits removal of of a nonremova-

ble case, as defined therein. On such basis the district / appeals court had no jurisdictional authority to make any rulings in this case. A federal question is not created by defendant's assertion of an issue of federal law in defedant's pleadings or in the notice of removal. **(See People v. Kerr-McGee Chem. Corp. (7th Cir. 1982) 677 F2d 571, 575. [Also see Appeal p. 17]**

The court is reminded that MTA failed to Answer most of the allegations of the Second Amended Complaint [Allegations # 45 to 134]., which was never denied.

REASON FOR GRANTING THE PETITION

A. This case underscores the fact that the federal judges were clearly not familiar with, or chose to ignore current State of California workers compensation related laws and regulations required to adjudicate workers compensation law related related claims. Especially, in light of recent budgetary cuts to the federal court system, for cost containment purposes it would appear to be most prudent, that the lower courts judiciary's time, and court resources, would be better spent, entertaining cases over which the district / appeals courts hold clear jurisdictional authority, and where in question such cases should be remanded.

This is especially true in light of the Supreme court's ruling that the district/ appeals courts cannot create jurisdiction to rule on merits where subject matter jurisdiction is lacking as set forth herein. Continued circumvention of the Supreme Court's ruling will continue

to cause an unnecessary drain upon the taxpayers of the United States. For example, the present case is now entering it's seventh year, in the federal court system, whereby there have been repeated attempts to substitute and apply federal law.... in a case that requires state laws and regulations for adjudication, as provided in the state's constitution, the rulings of the state's Supreme Court, and supporting case law including the leading case on the state's exclusivity, **[Vacanti v. State Comp. Insurance Fund].**

B. Because of the arbitrary rulings, and oftentimes contradictory rulings amongst Appellate cicuits pertinent to the issue of lack of subject matter jurisdiction, and "non-removable cases" as defined by **28 U.S.C. sec. 1445 (c)**, this case presently before the Supreme Court is very important, in that a clear ruling will serve as a hallmark, and guide for future district / appeals court jurisprudence, to prevent this type of waste for which the taxpayers must ultimately foot the bills.

C. The Appellate cirucuits are presently struggling to such an extent, that the instant case serves to underscore the fact that ... different and totally opposite rulings pertinent to **1445 (c)** have been applied...by two different circuits, to the same "interested party" in this case.

As the owner of Hertz Claim Management in this case, American Airlines is an interested party, which in this case benefited from the ruling of the Ninth Circuit Panel in that it ruled that protection under **sec. 1445 (c)**

is a nonjurisdictional "waivable" right.

This ruling is contradicted by the 5th Circuit's ruling that, removal of claim arising under workers compensation laws of a state is prohibited by statue regardless of whether jurisdiction is based on diversity or federal question. **28 U.S.C. section 1445 (c) *Sherrod v. American Airlines Inc* 132 F 3d 1112 (5th Cir. 1998)**

- By inference the latter would clearly raise the issue of subject matter jurisdiction if such a case was to be removed and raising such an issue is "nonwaivable" as set forth herein, and clearly "jurisdictional" in nature.

D. The rulings of the Ninth Circuit, whereby there is an attempt to "create subject matter" for jurisdiction for itself and federal court, contradict the rulings of the United States Supreme Court, including but not limited to the court's finding that, a federal court is of limited jurisdiction, and may adjudicate only those cases authorized by the Constitution and by Congress, Unlike states they have no inherent or general subject matter jurisdiction **(See *Kokkonen v. Guardian Life Insurance Co. of America (1994)* 511 U.S., 375, 377, 114, S.Ct. 1673, 1675, 1677 (994); *Finley v. United States (1989)* 490 US 545, 109 S. Ct. 2003, 2008).**

The Supreme court found that Article III jurisdiction will not be assumed for the purpose of deciding a case on the merits (hypothetical) jurisdiction, even where the legal issues could be readily resolved. **–See [Steel Co. v. Citizens for Better Environment, supra, 523 U.S. at 101-102, 118 S. Ct. at 1016].**

Consistent with the United States Supreme Court related rulings, the Montana Court of Appeals has clearly decided that if a *case* is improperly removed, the federal court must remand because... it has no subject matter jurisdiction to decide the case. – **Arco Environmental Remediation, LLC v. Department of Health and Environmental Quality of Montana, 213, F. 3d 1108.**[As set forth in Petition For Full Court Hearing by Petitioner Delaney E. Smith Jr.,M.D.]

E. The Ninth District Court decisions, pertinent to sec. 1445 (c) imposes the burden on District court of having to entertain cases in which they have no jurisdictional authority to adjudicate the causes of action, when facts of the case are inextricably interwined in state workers compensation laws and regulations, and done so at great waste and expense to our taxpayers and the affected petitioner, who should be entitled to sanctions, including attorney fees for illegal defense [in district court], and wrongful removal.

The Ninth Circuit's primary error which led to it's present position, concerning whether violations of the federal statue **Title 28 U.S.C. section 1445 (c),** which defines workers compensation law related cases as being "non jurisdictional" was plainly set forth for the Ninth Circuit Appeals court, in the Petitioners petition entitled "Addendum to, Petition for Full Court Hearing; Lack of Subject Matter Jurisdiction etc....."

As set forth therein, the Appeals Court Memorandum overlooked the fact that in citing **Vasquez v. North County Transit Dist. 292 F 3d 1049, 1061 (9th Circ. 2002),**

the Ninth Circuit's ruling was also based upon an earlier ruling **[Williams v. AC Spark Plugs Div. of General Motors Corp., 985 F 2d 783m 786 (5th Circ. 1993)]**. In that 1993 ruling the 5th Circuit Court found that due to diversity of citizenship, the **Williams v. AC Spark Plugs** case was within the jurisdiction of the federal court. There is no such diversity issue in the instant case that was presented to the Ninth Circuit Court of Appeals, and which in now presently before this most distinguished body.

In the earlier case of 1993... **Williams v. AC Spark Plugs** the 5th Circuit court did rule, as the Ninth circuit would rule in this case, that ....even if **1445** applies... it's bar against removal of workers compensation claims is nonjurisdictional and may be waived. Regarding the case now before for the court, even more important than the fact there is no diversity issue to create federal jurisdiction, is that the Ninth Circuit Panel overlooked the fact that the 5th Circuit Appeals Court had later changed it's position regarding **28 U.S.C. sec. 1445 (c)**...but the Ninth Circuit continued to cite the earlier 5th Circuit ruling.

In 1998, the finding of the 5th Circuit was that a plain reading of the statue lends credence to the proposition that **sec. 1445 (C)** prohibits the removal of any state workers compensation claims. The court held that **sec. 1445 (c)** prohibits removal of any state workers compensation claims whether jurisdiction is based on diversity or federal question. **Sherrod v. American airlines Inc., 132 F 3d 1112 (5th Circuit 1998)** [See Petition for Full Court Hearing; Lack of Subject Matter Jurisdiction....etc p. 7.

Stated another way, outdated rulings of the 5th Circuit Appeals Court were directly and or indirectly applied to the instant case, when the Ninth Circuit Court of Appeals overlooked the fact the 5th Circuit Appeals Court had since reversed itself on the earlier 5th Circuit (1993) ruling as set forth above.

Regarding the matter of subject matter jurisdiction, and it's application to the matter of State of California workers compensation law based cases, the lead state of California Supreme Court case which established the "exclusivity of state court"...**Vacanti v. State Compensation Ins. Fund, 24 Cal. 4th 800 (2001)** was cited by judge Nora Manella of the District Court- **See Order Granting in Part and Denying in Part Defendant Presidium/ Cambridge's Motion to Dismiss.- An excerpt was attached as Exhibit A to Petition for Full Court Hearing...etc.**

In recognizing the exclusivity of the Workers Compensation Appeals Board WCA [WCAB], as set forth in Vacanti...the District Court at that point was obligated to address the issue of it's subject matter jurisdiction, in light of the State of California's Supreme Court ruling, as well as it jurisdictional authority under such circumstances to dimiss any aspect of a state of California workers compensation law related case. The ruling of the Appeals court, in supporting the rulings of the District court, contradicted it's own earlier ruling, whereby the 9th District had found that, when interpreting state law, the Court of Appeals is bound to follow the decisions of the state's highest court, **See Vasquez v. North County Transit Dist. 292 F 3d 1050 (9th Cir. 2002).**

Additionally, the Ninth Circuit Court of Appeals overlooked the fact, that since the MTA's removal to federal court was based upon an alleged... "federal question", there is no 30 day time waiver. While the Ninth Circuit's Memorandum ruled that..."Smith failed to timely object to removal and thus waived any objection on that

basis" citing **Vasquez v. North County Transit Dist.**, the Appeals court overlooked the fact that the same case makes it clear that, a motion to remand the case on the basis of any defect other than lack of subject matter jurisdiction must be made within 30 days after the filing of the Notice of Removal. **See Vasquez v. North County citing N. Cal. Dist. Council of Laborers v. Pittsburg-Des Moines Steel Co. 69 F 3d 1034, 1038 (9th Circ. 1995).**

Finally, the U.S. Ninth Circuit Court of Appeals made rullings in an illegally removed case, that was inextricably intertwined in State of California workers compensation law. State of California law specifically prohibits filing petitions for rulings on the pleadings and thus requires a hearing for judgement on the pleadings, as set forth in **Title 8, California Code of Regulations section 10490** which prohibits even the filing of demurrers, petitions for judgement on the pleadings, and petitions for summary judgement, as such defenses are not permitted under this California law. Only the **United States Supreme Court** can enter rulings that might otherwise appear to contradict state law. If there is any question as to whether such a case should have been remanded to state court, the U.S. Court of Appeals is obligated to remand the case under existing federal law, as clearly set forth in the Amended Appeal filed with the U.S. Ninth Circuit Court of Appeals by this petitioner.

In the 1993 earlier mentioned, 5th Circuit case, Circuit court judge Jerry E. Smith held that (1) wrongful removal of civil action arising from state's workers compensation laws was a procedural defect that was waived when plaintiff failed to move for remand within 30 days. **See Williams v. AC Spark Plugs 985 F 2d 783 (5th Cir. 1993).**

As stated above, the U.S. Ninth Circuit Court of Appeals overlooked the fact that the 5th circuit had already reversed itself (1998) at the time of the 2002 Ninth Circuit ruling, whereby in **Vasquez v, North County Transit...citing Williams v. AC Spark Plugs** in that case...the Ninth circuit ruled **[1445 (c)]**, it's bar against removal is non-jurisdictional and may be waived. **See Vasquez v. North County Transit Dist. 292 F 3d 1049, 1062.**

The basis for the Petioner's Motion for Remand was was repeatedly, "lack of subject matter jurisdiction". Unlike other defenses, and in contradiction to the Memorandum, the defense of lack of subject matter jurisdiction is never waived. Accordingly, issue of subject matter jurisdiction should have been adequately addressed prior to the disposition of the case by the U.S. Court of Appeals, that is in a manner that is consistent with **sec. 1445 (c),** as the expressed intent of Congress. The 5th Circuit Court of Appeals has ruled that, courts must presume that a legislature says in a statue what it means, and when the words of a statue are unambiguous, the first canon is also the last, and judicial inquirie is complete – **In re-Hart, 328 F. 3d 45.**

It is hereby respectfully requested, that the United States Supreme Court intervene at this time to clarify the intent of the United States Congress, as expressed through federal statue **Title 28 U.S.C. section 1445 (c)** to repair the present split between the Circuits, as to whether violations are "procedural" and therefore waivable after 30 days, or is "jurisdictional" and therefore a non-waivable right to protection of forum selection in state of workers compensation law related cases.

Conclusion

For the foregoing reasons, a Writ of Certiorari prayerfully will be granted. A clear and final statement from the United States Supreme Court, that strongly prohibits removal and offers clear sanctions of attorney fees, and all other payments of retribution deemed apppropriate, for wrongful removals and violations of **1445 (c)**, will serve as a disincentive for those who now frequently attempt to circumvent governing state laws and regulations, for the purpose of delaying and or evading payments of uncontested bills for medical services rendered, by deliberately contravening the law.

The district / appeals courts in this case attempted to substitute federal law for state of California workers compensation regulations. For instance in the case of workers compensation related fraud... "intent" is not a prong, or element that must be proven to establish fraud, and the ruling of the Appeals court would heighten the bar needed to establish workers compensation fraud.

Under existing California law workers compensation law, fraud can be established by merely demonstrating that false statements were made, to avoid making workers compensation related payments for benefits, that include payment for medical services rendered to injured workers. In this case the petitioner presented the conflicting Admissions, of the MTA and Travelers, and the related contract when the MTA made the claim that in 1998 Travelers insured the MTA's workers compensation program. In actuality Travelers began offering only "reinsurance coverage", for the MTA's self insured workers

compensation program. **[See Appeal p. 25, ER p. 120, 342-350]. There should be no question as to whether the issues of the case are workers compensation law related. [See Appeal 29,30,31,32,33,38,39,40] Appeal ER p. 7,100,102]** The MTA and Travelers had earlier claimed that because of an alleged insurance contract with Travelers, the Baldwin Hills Medical Group (BHMG) had to be deleted from MTA's Panel of treating physicians. After deleting BHMG from MTA's medical panel, MTA continued to take PPO deductions from payments made for services rendered by BHMG's medical providers, including the petitioner Dr. Smith, at fees well below those required by the state's industrial fee schedule as set forth in **labor code 5307.1.**

The case was workers compensation law based and both the Petitioner, the Respondents and even the judge all aluded to to specific workers compensation laws and regulations required to adjudicate the case, such as those set forth herein. Presidium attorney Eric Schnurpfeil and Travelers attorneys Holmes and Crawley made false claims, and or inferences that Presiidium / and Travelers, were not bound by **labor code 4603.2**, and that the code was not applicable, at about the same time respondent Presidium/ Cambridge was being fined by the the State of California Department of Industrial Relations for this same code violation in still another case..., and such evidence was provided for judicial review [See Stipulation to Corrective Action, Remdial Measures, and Assessment of a Civil Penalty **(Labor Code sec. 129.5)** and Order Re Findings by the Administrative Director Based Upon Stipulations – Attached as a part of Exhbibit

B to Objection to Notice of Appearance filed by Attorney Eric Schnurpfeil to Make Appearance for Presidium; Cambridge Integrated Services; AON and Request for Judicial Notice- which Appeals court had an obligation to review]. The U.S. Appeals court failed to consider evidence of attorney fraud submitted for judicial review, for the purpose of establishing, "fraud upon the court".

In still other cases the employer MTA has been sanctioned for as much as $75,000.00...specifically for failing to pay monies owed to the Baldwin Hills Medical Group for services rendered to MTA's injury workers [See James Belcher v. LACMTA c/o Constitution State Services [Travelers] -Opinion and Order Approving Compromise and Release [on penalties and interest] Case Number(s) MON 206079; MON 215489; MON 230321; VNO 370718- State of California Division of Workers Compensation. In one such case in which a patient Sedgwick Mc Cray, chose to exercise his right to designate Dr. Smith/BHMG as his physician, only to have counsel for MTA the file false documents with the WCAB to facilitate the transfer, alluded to in allegation 21 SAC [See Appeal ER p. 184].

After the WCAB Administrative Director determined that counsel had made false claims in an attempt to facilitate transfer of care, counsel for MTA then made false claims in a complaint filed against Mr. Mc Cray, in Superior Court, which included the assertion that Mr. Mc Cray had been seen on video tape performing activites in violation of his physician's restrictions. As orthopedic specialist William Simpson M.D. reported, his review saw no such violations, because at the time of the video there

were no physicial restrictions except that the patient should not yet drive a bus due to public safety concerns. The employer and counsel made false claims to support the wrongful termination of the injured worker Sedgwick Mc Cray, and thereby engaged in workers compensation fraud. The case was dismissed by Superior Court, because it was a WCAB law related matter that did not allege a civil conspiracy or RICO violations and accordingly should not have been filed in state court [Superior Court] as set forth in the **Vacanti case**. The employer and counsel used the United States Postal Service- **See Los Angeles County Metropolitan Transportation Authority v. Sedgwick Mc Cray. [BC250377 Superior Ct.] (2001)**. Retalliation because the patient refused to be transferred to MTA's physicians was improper.

Still other related WCAB rulings were attached to the Second Amended Complaint as Exhibits 20, 21, overwhich the district / appeals courts had no authority to weigh, evaluate, or change according to prior rulings of the Ninth Cicuit. Lacking the authority to review or weigh a state appeals court findings, the district ./ appeals court had an obligation to remand the case to the court from which it had been removed.

The district / appeals courts had no jurisdictional authority and should have remanded the case to state court from which it had been removed in violation of 1445 (c). No court in the United States, except for the United States Supreme court can rule on merits of a state of California workers compensation law related case based

upon the pleadings, and for any court to do so is a violation of **Title 8 California Code of Regulations 10490,** which prohibits rulings on the pleadings [without a trial].

Consistent with State of California Supreme Court rulings in the Vacanti case, the case before the Supreme court was appropriately filed in state court [superior court] because the causes of action were intertwined with allegations of "conspiracy". The antics of counsel that began with the wrongful removal of the case from state court, has caused a nearly 7 year delay in adjudication of perfectly valid claims for restitution, through a variety of undeserved, demonstrations of "bad faith" and illegal attorney conduct, as set forth herein. Only one Appellee the MTA filed a response to the Appeal, and the petitioner, requests all appropriate related sanctions, including attorney fees incurred while in the district court.

SUMMARY

The district / appeals courts have no jurisdictional authority to make rulings where subject matter jurisdiction is lacking, except for the authority to make the decision to remand the case to the court from which it has been illegally removed. State law workes compensation claims cannot be removed to federal court, regardless of whether removal jurisdiction is based on diversity or a federal question. ***[28 U.S.C. sec. 1445 (c); Humphrey v. Sequentia, Inc*** (8th Cir. 1995) 58 F. 3d 1238, 1245].

There is no related 30 day statue of limitations waiver of rights in such cases, or matters that include allegations of fraud upon the court, or extrinsic fraud. Under Califor-

nia law, if judgment is obtained through extrinsic fraud, time limitations contained in statue governing motions to vacate judgments do not apply. West's Ann. Cal, Civ. Code sec, 473 In re Lake, 202 B.R. 751. Rulings on the pleadings, and merits of case by district / appeals courts was done in violation of state of California law C.C.R 10490, which prohibits the filing of Motions for rulings on the pleadings and for summary judgment.

Issues of credibility, and related causes of action for fraud, and fraud upon the court, and workers compensation related fraud require a trial, under California state and or federal law. The district / appeals court lack the jurisdictional authority to make rulings on merits of case in the absence of a trial.

Distict / appeals court lack the jurisdictional authority to order parties into arbitration, or to confirm, or enter the results without a hearing or trial to first determine the parties to such arbitration. Delaney and Stephanie Smith as non-parties refused to arbitrate, the court lacked the jurisidictional authority to order the parties to arbitrate as did occur in this case. Jurisdictional authority to order arbitration does not extend to district courts, when the arbitration agreement specifically requires that state law is to govern the proceeding, as set forth herein.

Original Submitted, 12/11/06
Change of Format, 2/4/07

Next Revision, 4/23/07
By Petitioner: _____

Delaney E. Smith Jr.,Pharm.D.,M.D.
P.O. Box 78159
Los Angeles, California 90016
28

APPENDIX page 1a.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CASE NO. CV 00-5986 NM (CWx)

BALDWIN HILLS MEDICAL GROUP CORPORATION, a California Medical Corporation, DELANEY E. SMITH JR.,M.D, an individual, STEPHANIE SMITH, an individual,

Plaintiffs,

v.

LOS ANGELES METROPOLITAN TRANSIT AUTHORITY, et. al.

Defendants,

ORDER VACATING PLAINTIFFS' MOTION FOR REMAND AND REQUEST FOR RULE 11 SANCTIONS

Plaintiffs filed a Motion for Remand and Request for Rule 11 Sanctions on July 31, 2000. In this motion, plaintiffs failed to allege compliance with Local Rule 7.4.1, which requires a pre-filing conference of counsel. Plaintiffs are reminded that Rule 7.4.1 requires not only this prefiling meeting but also a statement to the following effect; "This motion is made following the conference of

counsel pursuant to Local Rule 7.4.1 which took place on (date)." Local Rule 7.4.1. Because of its failure to allege compliance with the meet and confer requirements of the Local Rules, plaintiffs' Motion for Remand and Request for Rule 11 Sanctions is vacated and taken off calendar, with leave to refile at a later date following compliance with Local Rule 7.4.1.

DATED: August 7, 2000

Nora Manella
United States District Judge

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES – GENERAL

CASE NO. CV00-05986-NM(CWx)

TITLE: Baldwin Hills Medical Group et al

v.

First Health

PRESENT: HON. NORA M. MANELLA, JUDGE

Judith Hurley	N/A
Deputy Clerk	Court Reporter

ATTORNEY FOR PLAINTIFF	ATTORNEY FOR DEFENDANT
N/A	N/A

PROCEEDINGS: IN CHAMBERS

(Re Plaintiffs motions set for 8/11/03)

On June 25, 2002, Plaintiffs filed a motion to remand the instant action on the ground that it was improperly removed from Los Angeles Superior Court over two years ago. The instant action was properly removed from Los Angeles Superior Court over two years ago. The instant action was properly removed to this court, as Plaintiffs asserted federal claims under 42 U.S.C. sec

1983 and 1985 for alleged violations of their civil rights. See Caterpillar Inc., v. Williams, 482 U.S. 386, 392-393 (1987). Although Plaintiffs other claims would not have invoked the jurisdiction of this court, the presence of Plaintiffs' federal civil rights claims allowed Defendants to remove the entire case. See Wiscounsin Dept. of Corrections v. Schact, 524 U.S. 381, 386 (1998). That Plaintiffs' claims included allegations of regarding the workers system is immaterial, as Plaintiffs' claims did not "arise under" California workers compensation law. See Vasquez v. City of San Diego, 292 F. 3d 1049, 1061 (9th Cir. 2002). Moreover 28 U.S.C. sec. 1445 (c) prohibition against removal of workers compensation claims is non-jurisdictional and may be waived. See id at 1063. As Plaintiffs did not file a motion to remand the case within 30 days after the notice of removal, as required by 28 U.S.C. sec. 1447 (c), Plaintiffs waived any objection to the removal of the action.

Accordingly, the court **DENIES** Plaintiffs' motion to remand the action to Los Angeles Superior Court.

On July 8, 2003, Plaintiffs filed a motion for a rehearing of the Court Clerk's entry to tax costs and for a stay of judgment pursuant to Fed. R. Civ. P. 54(d)(1). Plaintiffs' motion challenges the awarding of costs to Defendants Travelers Indemnity Co., Travelers Indemnity Co. of Illinois and Constitution State Service Company (collectively, "Travelers"). Plaintiffs assert that they should not have been billed for a videotaped deposition; (2) the deposition exceeded seven hours; (3) more than one deposition form the same person was obtained; and (4) this court lacked jurisdiction to enter judgment.

Plaintiffs motion is **Denied.**First Travelers sought costs for the written transcripts of Dr. Smith's deposition only. See Holmes Decl. Ex., A. Second, Rule 30(a)(2)(B) allows a deposition to exceed 7 hours if parties so stipulate. See Reyna Decl. para. 5 Moreover, each of the nine Defendants was entitled to depose Dr. Smith. As his deposition lasted only three days, it is unlikely that each party's portion of the deposition exceeded the seven hour limit. Third, Dr. Smith's deposition was twice continued, not "renoticed" as Plaintiffs assert. See Reyna Decl. para 2-4. Fourth, for the reasons set forth above, this action was properly removed to this court; accordingly, the court had jurisdiction to enter judgment.

Included in Plaintiff's motion to retax costs is a motion for reconsideration of the court's order granting the Los Angeles MTA's motion for Summary Judgment. Plaintiffs rely on the Supreme Court's recent decision in Desert Palace, Inc. v. Costa 123 S. Ct. 2148 (2003). See Motion para. 14. There, the Supreme Court held that a plaintiff may establish a mixed motive employment discrimination claim based on circumstantial evidence. Contrary to Plaintiffs' assertion, Desert Palace, does not stand for the proposition that a plaintiff may rely on conclusory allegations to defeat motion for summary judgment. As set forth in the court's order of April 29, 2003, the record was devoid of evidence supporting Plaintiffs conclusory allegations that the Los Angeles MTA maintained a policy or custom of discriminating against Plaintiffs or other DBE medical providers. See 4/29/03 Order. Accordingly, Plaintiffs Motion for reconsideration is **DENIED.**

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

CASE NO. CV 00-05986-NM (CWx) DATE: 8/27/03

TITLE: Baldwin Hills Medical Group, et al
v.
Los Angeles Metropolitan Etc., et al

PRESENT: HON. NORA MANELLA, JUDGE

Judith Hurley	N/A
Deputy Clerk	Court Reporter

Attorney For Plaintiff	Attorney For Defendant
N/A	N/A

PROCEEDINGS IN CHAMBERS

Plaintiffs are Ordered to Show Cause, in writing no later that 9/4/03, why this action should not be dismissed for failing to arbitrate any claims against First Health, pursuant to this Court's order of 4/20/01.

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT COURT OF CALIFORNIA

CIVIL MINUTES – GENERAL

CASE NO. CV 00-05986- NM(CWx) DATE: 2/9/05

TITLE: Baldwin Hills Etc. – v Los Angeles Metropolitan, Etc,, et al

PRESENT: HON. NORA M. MANELLA, JUDGE

Judith Hurley
Deputy Clerk

N/A
Court Reporter

ATTORNEY FOR PLAINTIFF ATTORNEY FOR DEFENDANT

N/A N/A

PROCEEDINGS: Order Denying Plaintiff's Motion to Vacate Dismissal & Remand Original Complaint.

On December 17, 2004 Plaintiff Delaney E Smith Jr.,M.D. ("Plaintiff"), filed a Motion to Vacate Dismissal and Remand Original Complaint. Although Plaintiff's motion is at times incoherent and disjointed, the motion essentially seeks to vacate all rulings in this matter and to remand the action to Los Angeles Superior Court, because this court allegedly lacks subject matter jurisdiction. Plaintiff reasserts the same arguments the previously raised in

his Motion to Remand filed on June 25, 2003, which the court denied on August 5, 2003.

As the court stated on it's August 5 order, the instant action was properly removed to this court, as Plaintiffs asserted federal claims under 42 U.S.C. sec. 1983 and 1985 for alleged violations of their civil rights. See Caterpillar Inc. v.Williams, 482 U.S. 386, 392 (1987) 1 Although Plantiffs' other claims would not have invoked the jurisdiction of this court, the presence of Plaintiffs' federal civil rights claims allowed Defendants to remove the entire case. See Wisconsin Dept. of Corrs. v. Schacht, 524 U.S. 381, 386-87 (1998). That Plaintiffs claims included allegations regarding the workers compensation system is immaterial, as Plaintiffs' claims did not "arise under" California workers compensation law. See Vasquez v. North County Transit Dist (NCTD) 292 F. 3d 1049, 1061,, (9th Cir. 2002). Moreover, 28 U.S.C. sec. 1445 (c)'s prohibition against removal of workers compensation claims is non jurisdictional and may be waived, See id at 1062; Williams v, AC Spark Plugs Div. of Gen. Motors Corp., 985 F 2d 783, 786 (5th Cir. 1993) (1445 (c)'s "statutory restriction against removal is not a matter of substantiative jurisdiction, but rather a procedural defect that the [plaintiff] waived"). As Plaintiff did not file a motion to remand the case within 30 days after the notice of removal, as required by 28 U.S.C. sec. 1447 (c). Plaintiff waived any objection to the removal of the action.

Plaintiff further argues, based on vague references to fraud on the court, that the court's prior orders granting

summary judgment to various defendants should be vacated. The court granted summary judgment to: (1) Hertz Claims Management on February 5, 2003; (2) Los Angeles County Metropolitan Transit Authority on April 29, 2003; (3) Presidium Inc., Cambridge Integated Services Group, Inc and AON Corporation on May 21, 2003; and (4) Travelers Indemnity Company, Travelers Indemnity Company of Illinois, and Constitution States Service Company on May 28, 2003. Pursuant to Federal Rule of Civil Procedure 60 (b),, a motion for relief from from a final judgment or order based upon fraud must be made within a reasonable time. but not more than one year after judgment or order was entered. Fed. RI Civ P. 60 (b) Plaintiff's instant motion wa filed more than one and a half years after the summary judgement orders were entered, and is therefore time barred.

1. This action was originally filed by Plaintiffs Baldwin Hills Medical Group Corporation, Delaney E. Smith Jr.,M.D., and Stephanie Smith (collectively, Plaintiffs").

Accordingly, the court **DENIES** Plaintiff's Motion to Vacate Dismissal and Remand Original Complaint. Plaintiff is reminded that a person "who multiplies the proceeding in any case unrreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys fees reasonably incurred because of such conduct. 28 U.S.C. sec. 1927. While the court declines, in it's discretion, to award sanctions for the instant motion, in the future, any similarly frivolous motions will be subject to sanctions.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

FILED AUG 04 2006

No. 05-55370

D.C. No, CV-00-05986-NM

MEMORANDUM*

BALDWIN HILLS MEDICAL GROUP, a California Medical Corporation; STEPHANIE SMITH, an individual,

Plaintiffs, and

DELANEY E. SMITH JR.,M.D.

Plaintiff-Appellant, v.

LOS ANGELES COUNTY METROPOLITAN TRANSPORTA-TION AUTHORITY et. al.

defendant/appelle

and

TRAVELERS INDEMNITY COMPANY; TRAVELERS INDEMNITY COMPANY OF ILLINOIS; CONSTITUTION STATE SERVICE CO; AFFORDABLE MEDICAL NETWORK; FIRST HEALTH,

defendants,

Appeal from the United States District Court
for the Central District of Califonia
Nora M. Manella, District Judge, Presiding

Submitted April 6, 2006**

Before:
FARRIS, BOOCHEVER, and LEAVY, Circuit Judges

Delaney E. Smith Jr.,M,D. (hereinafter "Smith") appeals pro se the district court's judgment in favor of defendant-appellee Los Angeles County Metropolitan Transit Authority ("MTA"). We have jurisdiction pursuant to 28 U.S.C. sec. 1291 and we affirm.

The parties are familiar with the procedural history. Smith first argues that the district court lacked jurisdiction because his claims arise under California workers compensation law, and therefore, 28 U.S.C. 1445 (c) [1] bars removal to federal court. We disagree.

Smith's complaint alleged violations of 42 U.S.C. sec. 1983 and 1985. Therefore, the district court had jurisdiction pursuant to 28 U.S.C. sec. 1331. ("The district

** This case unanimously finds this case suitable for decision without oral argument. See Fed. R. App. P. 34 (a)(2).

1. U.S.C. sec. 1445 (c) " A civil action in any State court arising under the workmen's compensation laws of such State may not be removed to any district court of the United States".

courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States"). Removal was available because the district court had original jurisdiction to the claim under federal law. Removal was available because the district court had original jurisdiction to decide the claim arising under federal law. 28 U.S.C. sec. 1441 (b). Assuming, only for the purpose of argument, that Smith's claims are ones "arising under" California Workers Compensation law, Smith filed an amended complaint in federal court. In these circumstances, Smith's claims may be properly as having been initiated in federal court. Vasquez v. North County Transit Dist. 292 F. 3d 1049, 1061 (9th Cir. 2002) Moreover, Smith failed to timely object to removal and thus waived any objection on that basis. Id. at 1062 ("Even if sec. 1445 (c) otherwise applies here, it's bar against removal of workers' compensation claims is nonjurisdictional and may be waived.")

Smith argues that the district court erred in granting summary judgment to MTA. The district court determined that Smith failed to establish a prima facie case of racial discrimination, therefore the issue is waived. See Mendoza v. Block 27 F. 3d 1357, 1363 (9th Cir. 1994) (stating that failure to raise an issue in an opening brief results in waiver of the issue on appeal). Our review of the record leads us to conclude that the district court did not improperly weigh the evidence, determine credibility, or apply erroneous legal standards in granting motion for summary judgment.

Smith argues that the district court lacked authority to compel arbitration with one defendant. The record

discloses that several of Smith's contracts contained clauses requiring arbitration of "any problems or disputes" arising under the contracts. We have construed such clauses as extending to every dispute with a significant relationship to the agreement. " The existence of an agreement to arbitrate establishes a federal presumption in favor of arbitration and "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration." Moses H. Cone Memorial Hosp. v. Mercury Construction Corp., 460 U.S. 1, 24-25 (1983). Accordingly the district court did not err in ordering arbitration.

We reject Smith's contention that the district court erred in denying the motion to recuse Judge Nora Manella for personal bias or prejudice, pursuant to 28 U.S.C. sec. 144. We review the denial of a motion for recusal for an abuse of discretion. See United States v. Scholl, 166 F. 3d 964, 977 (9th Cir. 1999). Judge Ronald Lew determined that the statements of the mediator were insufficient to ascribe a political leaning to Judge Manella and were not, in any event, directed at Smith individually. See United States v. Carignan, 600 F. 2d 762, 764 (9th Cir. 1979). There was no abuse of discretion in the denial of the motion for recusal.

Finally, we reject Smith's contention that the judgment should be vacated based upon fraud upon the court, Fraud upon the court "must involve an unconscionable plan or scheme which is designed to improperly influence the court in it's decision." Pumphrey v. K.W. Thompson Tool Co., 62 F. 3d 1128, 1131 (9th Cir. 1995)(internal citation omitted). The record does not support Smith's

contention of fraud or misconduct that harmded the integrity of the judicial process or resulted in a miscarriage of justice. The district court did not abuse its discretion in denying Smith's motion. We deny Smith's motions for judicial notice and we deny the motion to notice newly discovered evidence, No further motions for judicial notice or sanctions in this case will be considered by this court without the permission of the Appellate Commissioner.

AFFIRMED.

UNITED STATES COURT OF APPEALS

FOR THE NINTH CIRCUIT

No. 05-55370
D.C. No CV-00-05986-NM
Central District of California
Los Angeles,

Baldwin Hills Medical Group Corp., a Califorjnia Medical Corporation; Stephanie Smith, an individual

Plaintiffs,

and

Delaney E. Smith Jr.,M.D.

Plaintiff – Appellant

v.

Los Angeles County Metropolitan Transportation Authority; Hertz Claim Management Corporation; Presidium Inc; Cambrdige, e/s/a Cambridge Integrated Services Group Inc; AON Corporation,

Defendants – Appellees

and Travelers Indemnity Company; Travelers Indemnity Company of Illinois; Constitution State Service Co; Affordable Medical Network; First Health,

Defendants,

ORDER
Filed September 15, 2006

Before:FARRIS, BOOCHEVER, and LEAVY, Circuit Judges.

The panel has voted to deny appellant's petition for panel rehearing and recommends denial of the petition for rehearing en banc.

The full court has been advised of the petition for rehearing en banc and no active judge has requested a vote on whether to rehear the matter en banc. Fed. R. App. P 35.

The petition for panel rehearing and petition for rehearing en banc are DENIED.

(2)

FILED
JUN 6 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

No.

IN THE

SUPREME COURT OF THE UNITED STATES

Delaney E. Smith Jr.,M.D. Pro Se
Stephanie Smith R.N. Pro Se

Petitioners

v.

Los Angeles County Counsel Raymond Fortner Esq., Susan Tsou Esq.. Valerie Wiles Esq.; Los Angeles County Department of Children and Family Services, Regional Director Charles Tadlock, Janice Spicer [Social Worker]; Los Angeles County Harbor UCLA Medical Center, et. al,

IN MATTER RE: MICHAEL D. SMITH JR., A MINOR,

NOTIFICATION OF ERROR; WITH REQUEST FOR ORDER

PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Supplemental brief

PETITION FOR WRIT OF CERTIORARI

DELANEY E. SMITH JR.,M.D.
P.O. BOX 78-159
LOS ANGELES, CALIFORNIA 90008
(323) 395-9911

QUESTIONS PRESENTED

(1) Whether District Court Judge Lew should have considered Motion For Recusal Prior to Remand [Attempt] to the State Court, or "sua sponte" as a re-quirement under ***Title 28 U.S.C. sec. 455 (a)?***

(2) Whether Appeals Court Erred in overlooking post-removal laws, which provide that post removal conduct is reviewable thereby causing entire matter to be reviewable?

(3) Whether Superior court judge Margaret Henry and Los Angeles County Counsel engaged in judicial and attorney improprieties, in ignoring federal post-removal laws that require cessation of state court entertainment of case following removal to federal court system, which thereby resulted in violations of *Due Process under 14th Amendment of United States Constitution and Rights to Familial Association, and Illegal Detention of a U.S.* Citizen.

(4) Whether state law(s) granting immunity for reckless, behaviour, for those responsible for creating reports of child abuse is unconstitutional, contravene federal laws of protection, in violation of the ***United States Constitution 14th Amendment Protection, for which remedy is available through 42 U.S.C section 1983??***

PARTIES TO THE PROCEEDINGS

Delaney E. Smith Jr., Pharm.D..M.D. and Stephanie Smith R.N. [Nominated Guardian-Grandparents – Pursuant to California Probate sec 2108 (a); and [Pending Senate Bill S.661 Title III sec, 301 Kinship Caregiver Support Act InGeneral Section 471 (a)(19) of the Social Security Act 42 U.S.C. 671 (a) (19) – Amended (effective date 10/1/07).

Petitioners,

v.

Los County Counsel Raymond Fortner Esq., Lloyd Pellman Esq. Susan Tsou Esq., Valerie Wiles Esq., Los Angeles County Department of Children and Family Services, Regional Director Charles Tadlock, Janice Spicer,[Scoial Worker] Los Angeles County Harbor UCLA Medical Center, Frederick Mishkin M.D.

Respondants,

Page 12. – Under Facts of Case should read.... "On October 15, 2005 there was.....

Request For Order:

It is respectfully requested that the Supreme Court issue an Order to Superior Court that there should be cessation, of that court's entertaining any aspect of the case now before the U.S. Supreme Court until there is a ruling pertinent to the Petition for Writ of Certioarari to the United States Supreme Court. As set forth therein, following the refusal of the judge to accept recusal request; and subsequent removal to federal court on 6/22/05 judge Henry at juvenile court continued to hold hearings

The most recent hearing, was held on 5/31/07 at which time a copy of Petition For Writ of Certiorari was served on the [judge's] Clerk, Ms. Hardy who said that she was not going to file the document, or issue stamped copy to Dr. Smith ...as judge Henry left the bench [shaking her head seemingly in frustration]. The attorney for father Michael Smith Sr; had earlier in the hearing informed the court that parties were present for a limited appearance because the case had been removed to federal court; which as usual was ignored by judge Henry.

Circumstances of judicial and attorney fraud resulting in fraud upon the court, gave rise to related rights for petitioners to remove case to any court of equity which in this case was the district court. In the state of California Superior Court Probate Court holds jurisdictional authority over cases, legal guardianship and adoption cases. The nominated guardian grandparents were notified in February 2006 that their home was more than adequate for placement by DCFS supervisor Stephanie Hargas, following the recommendation of social worker Jennifer Boemke.

Placement at that time was disrupted by county counsel, who indicated that they first wanted to review the file to be sure that there were no contradictory rulings by the judge. Since that time there has been no explanation from county counsel, as DCFS supervisors and most recently social worker Ruth Frazier has continued to recommend placement with the grandparents, until such time that the parents mature, complete more of their education in that the mother is still in highschool. This is a case inwhich the judge told the mother, that there was no evi-dence that she had done anything to harm the baby. A state of California overturned judge Henry's ruling that the father had caused the injuries as the Appeals court found that there was no evidence to support the judges conclusion [see Writ].

There is a related scheduled hearing for June 8, 2007 at: Superior Court –Los Angeles County 1725 Main Street Santa Monica, California 90401 [Case No. SP007143]. However, because the Juvenile Court- Superior Court located 201 Centre Plaza Drive [Room #420] Monterey Park California 91754...presiding judge Margaret Henry continues to hold hearings, inspite of the removal... at the most recent hearing in Probate Court at Santa Monica, on May 18, 2007 judge indicated that he could not act on the grandparents request to have the child returned to Los Angeles County from which he had ben illegally removed, and placed with grandparents without a court order.

It is respectfully requested that on an urgent basis, Supreme Court orders court at Monterey Park to stop all related heaings and vcacate all post removal rulings,[after 6/22/06] and to immediately release child to custody of grandparents Dr. and Mrs. Smith as per recommendation of DCFS social worker Mrs. Ruth Frazier (310) 348-6817. **There is medical urgency for purpose of evaluation in 19 month old child still not talking.**

Prayerfully Submitted on June 5, 2007

By:_____
Delaney E. Smith Jr.,Pharm.D.,M.D.

SUPREME COURT, U.S.
FILED
JUL 3 - 2007
OFFICE OF THE CLERK

NO. 06-1425

IN THE

SUPREME COURT OF THE UNITED STATES

DELANEY E. SMITH JR.,M.D. PRO SE

PETITIONER,

V.

LOS ANGELES METROPOLITAN TRANSIT AUTHORITY,
HERTZ CLAIM MANAGEMENT CORPORATION, ET, AL.,

RESPONDENTS,

PETITION FOR A WRIT OF CERTIORARI

PETITIONER'S REQUEST FOR INFORCEMENT OF SETTLEMENT WITH ATTORNEY FEES AND SANCTIONS; AND REQUEST FOR RELIEF FROM RETALIATION PURSUANT TO STATE LABOR CODE(S) 6310, 3850

DELANEY E. SMITH JR.,M.D.
P.O. BOX 78-159
LOS ANGELES, CALIFORNIA 90008
(323) 395-9911

Request for Enforcement of Settlement by the United States Supreme Court With Attorney Related Fees and Sanctions as Deemed Appropriate by the Court; and Order for Relief From Retaliation By Los Angeles County Counsel[pursuant to Labor code 6310; 3850

Petitioner, Dr. Delaney E. Smith Jr.,Pharm.D.,M.D. timely filed a Petition for Writ of Certiorari Appeal in this case, in which the United States Supreme Court issued an Order for the respondents, to file any opposing briefs by May 29, 2007. However, there was no opposition to the facts and claims made in the Writ, which would appear to confirm that the facts as stated therein are true.

If it so pleases the court, Petitioner believes that due to the protracted period of time, and related delays in payment, caused by respondents attempt to adjudicate State of California workers compensation law related claims in federal court, and to supplant state regulations required for adjudication with federal laws, that given the passage of time [7 years] it would now, be in the best interest of all the parties to agree to the earlier offer made by respondents during District Court Ordered mediation, as set forth in Petitioner's Writ of Certiorari Appeal, plus attorney and related arbitration fees., as set forth herein.
" A third party to the case, the mediator who was himself a retired judge told Dr. Smith tha he should settle the case for $100,000.00 offered by MTA, and $30,000.00 offered by each of the defendants...because the petitioner had been a victim of MTA corruption..." [see Writ p. 11]

Cost of Removal to District Court and Federal Court Related Attorney Fees are as follows:

Lawfirm of Buckner, Alani, Khouri, Chavos Mirkovich..... $ 136, 346.00

Robert Ramsey Jr. Esq. 120,000.00

Vera Curtis Brown Eq. 3,000.00

William Rake
Greenspan Insurance Adjustors Internat'l 49,650.00

JAMS [Arbitration Fees]..... 25,000.00

Delaney E. Smith Pharm.D.,M.D.
Board Certified Forensic Medicine Expert and Related Research, Document Preparation and Filings[2004 –Present]..... 125,000.00

$ 433,996.00

Cost of Removal / No. of Respondants or $ 433,996.00 / 10 Respondants

Equals Cost of Removal = $ 43,400.00 per respondant

MTA total payment = $100,000.00 + Cost = $ 143,400.00

Other Respondants $ 30,000.00 + Cost = 73,400.00 ea.

Total = $ 803,600.00 [plus interest 5% per annum from 2004 – Present ($140,630.00)]

Total Settlement + Cost = $ 944,230.00

***Plus Additional Sanctions Deemed Appropriate by Court**

According to the evidence, and findings of the forensic accounting firm Greenspan Insurance Adjustors Interna-

tional actual net losses, exceeded $ 7,000,000.00 in lost revenue to the medical practice owned by Dr. Smith. due to the exclusionary PPO policies and practices, of just one of the respondents First Health.

Request for Relief by Court Order [Pursuant to State of Calif. Probate Code 2108 (a); Labor Codes 6310; 3850

In separate case involving Los Angeles Angeles County petitioner Dr. Delaney Smith's, grandson was injured, while in the care of his parents, during which time there had been an earlier social event at their home on October 15, 2005. The next day Dr. Smith's son discovered that the child appeared to have stopped breathing. Brief apneic episodes [cessation of breathing] are not uncommon in neonates. CPR was immediately applied by the maternal grandmother who is not CPR or otherwise medically trained. Additionally, it was recorded in the 10/20/05 Addendum to Report of social worker that at times the newborn infant, [born 9/28/05] slept in the same bed with his parents [there was nothing in medical record that was inconsistent with an accidental roll over injury]

Anterior chest fractures are not uncommon during CPR, even by medically trained personnel. Upon admission to Los Angeles County – Harbor Medical Center on October 16,2005 it was discovered that the baby had 3 – 4 left rib fractures on chest ray. In error the 3-4 left anterior rib fracture were by poory supervised residents as posterior fracture [which are almost always associated with child abuse]. According, to the chart... the correction, to 3-4 left "anterior" from the earlier erroneous reading of "posterior" did not occur until hospital radiologist read the X Rays on November 7, 2005 nearly 2 weeks after foster placement.

The child was taken from hospital by social workers without notice, to nominated guardians" Dr. and Mrs. Delaney Smith who are also the grandparents, nor to any other relatives prior to placement into foster care. Such removal without notice, violated of various state and federal laws, that include Welfare and Institutions Code 332, 333, 335, 361, and 361.2 (f)(1)... the latter which prohibited the removal of the child from LA County where parents reside to Riverside County. Pursuant to Probate code 2108 (a) grandparents were nominated as guardians by parents, both of whom were minors on 10/17/05. The signed documents were placed on the chart same day, and prior to involvement of Dependency court. Grandparents should have been prioritized for placement; and parents wishes for placement considered *(Guardianship of Walsh (1950) 100 Cal. App. 2d 194, 196, [223 P 2d 322, 22 A.L.R. 2d 689] Also see In re* ***Vanessa p. 38 Cal. App 4th 1763, 1769; 45 Cal. Rptr. 2d 760 [Oct 1995]***

Children' Court supervising judge Margaret Henry has ignored post removal federal laws that required the cessation of state court rulings. LA County counsel **Raymond Fortner, Susan Tsou and Valerie Wiles** have also ignored the continuing recommendations by their client Los Angeles county Department of Children and Family Services, to return the child to the grandparents since approximately February 2006. The judge's claim that the father had caused the injury was overturned by the California state Appeals court last year, *[see DCA No. B190304; US Appeals Court No. 06-56635; Dist. Ct. No. 06-03918-RSWL; Super.Ct. No. CK 61213*], after Appeals Attorney was not informed of 6/22/07 removal to federal court system. . As to MTA, above settlement offer is to be rescinded if within 72 hours of receipt of this document, petitioner has not been contacted by county counsel for purpose of returning the child. See prohibitions against retaliation for fraud reporting *Labor code sec. 6310, 3850*

Respectfully Submitted By,

July 6, 2007

 Delaney Smith Jr.,M.D.

67. Second, argue Respondents, it is consistent with Order Nos. 888 and 888-A to calculate the CTC cap using New England Power's actual revenues from Norwood during the period before Norwood's termination of service. Respondents point out that the Judge found that the considerations on which Order No. 888 is based apply to the CTC formula, but they argue that she disregarded this by reducing Norwood's actual revenues in calculating the cap.

68. Next, Respondents challenge the Judge's determination that the effect of the sale of the non-nuclear generating assets was known and measurable at the time the CTC formula was filed. Respondents claim that the Judge failed to apply the Order No. 888-A principle that the revenues lost approach automatically captures an offset for the above-book market value assets. Respondents argue that, if the actual revenues paid by Norwood under rates applicable prior to termination are adjusted to take account of an asset sale or other events that took place months after termination, then the cap does not accurately measure the contribution Norwood was making to New England Power's fixed power supply costs before it terminated service.

69. Respondents further assert that the CTC cap adopted by the Judge is unsupported and gives Norwood the benefit of the settlement it repeatedly rejected. In fact, they continue, the ID prescribes a cap that assures Norwood of CTCs proportionately lower than the CTCs paid by any other customer because its recommended adjustment is based on a shorter payment schedule.[101] Respondents assert that the Commission has rejected a claim that a settlement negotiated with some customers sets a ceiling on the rate to be charged to non-settling customers,[102] and the court has agreed.[103]

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[101] Respondents cite Tr. 239, 628, 633-34.

[102] Respondents cite *Delmarva Power & Light Co.*, 6 FERC ¶ 61,084 at 61,162 (1979).

70. Next, Respondents argue that the record does not support the Judge's finding that the CTC formula cap treats certain variable costs as fixed costs. According to Respondents, the cap uses New England Power's cost of fuel as a proxy for its variable supply costs.[104] However, Respondents state that Norwood and Staff failed to quantify any variable power supply costs that are not included in New England Power's cost of fuel, as defined in the tariff.[105] Respondents assert that New England Power is not required to prove that the cost of fuel, as defined in the tariff, was exactly equal to its variable power supply costs, so the Judge's speculation that some unidentified and unquantified variable costs might have been omitted cannot justify the replacement of the CTC formula's provision with an alternative cap calculation.

71. Moreover, state Respondents, unchallenged evidence in the record establishes that the CTC formula's deduction for New England Power's cost of fuel covers more than just variable fuel costs; if anything, it is a conservative proxy for New England Power's variable power supply costs, because it includes significant amounts of fixed costs. Respondents claim that the Judge ignored evidence that Norwood's CTC obligation is still well below the CTC formula's cap pro-vision, even if the deduction for variable power supply costs were increased significantly to account for "certain [unidentified] variable costs" that the Judge believed may not be captured by New England Power's cost of fuel proxy.

72. Next, state Respondents, the Judge's recommendation that the CTC formula's cap be replaced because of her con-

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[103] Respondents cite New *England Power Co.*, 84 FERC ¶ 61,175 at 61,920 (1998); *Town of Norwood, Massachusetts v. FERC*, 202 F.3d 392, 402 (1st Cir. 2000).

[104] Respondents cite Ex. NEP-2, Schedule II-C, § B(4); Ex. NEP-27 at 43; Tr. 512-15.

[105] Respondents cite Tr. 666.

cern that certain variable costs may not be captured by the cost of fuel proxy inappropriately shifts the burden of proof to Respondents. Further, they claim that the ID does not identify any evidence that the alternative cap calculation it adopts is a just and reasonable measurement of the contribution that Norwood was making to New England Power's fixed power supply costs under those rates. In fact, assert Respondents, the alternative calculation adopted by the Judge does not remedy the defect she found in the cap calculated in accordance with the accepted CTC formula.

73. Staff maintains that the CTC cap is not intended to guarantee New England Power a continuation of payments it received when it was providing service to Norwood; rather, the cap is designed to ensure that Norwood pays no more than its share of New England Power's sunk costs. Staff also submits that New England Power poorly drafted the description of the Norwood CTC cap in its original filing so that it included some variable as well as fixed costs and that the language contemplates that some variable costs will be treated as fixed power supply costs and that the universe of variable costs is broader than simply fuel costs. Staff contends that the Judge correctly rejected New England Power's arguments concerning the composition of fixed costs in determining the maximum CTC for Norwood. Further, states Staff, because New England Power drafted the provision, it must bear the consequences of the ambiguity.

3. Commission Analysis

74. The Judge correctly stated that the cap issue is within the scope of this case. Further, the Commission previously ruled that the Norwood CTC is not governed by Order No. 888 and that differences between the Norwood CTC and the settling customers' CTC does not make the Norwood CTC unduly discriminatory. The Commission will not address these issues further. The tariff clearly establishes the manner in which the cap is to be calculated. However, the Judge did

not follow this formula in her determination of the cap applicable to the Norwood CTC, and the Commission will modify the ID in that regard. As discussed above, the CTC at issue here does not permit a credit relating to divested facilities; therefore, no such credit should be applied in determining the CTC cap.

75. As calculated by the Commission, the CTC cap is $157,982,793, plus applicable interest, as discussed below. This determination of this sum is reflected in Exhibit NEP-6, which shows a Total Revenue of $19,676,712, less the Transmission Revenue of $1,131,474 and less the Fuel Adjustment Revenue ($3,617,730), for a total annual contribution of $14,927,508 per year to New England Power's fixed costs times 10 years and seven months. Because this amount exceeds the CTC amount of $71,881,516 calculated above, the cap does not lower Norwood's CTC.

G. Other Issues

1. Interest

a. The ID[106]

76. New England Power asserted that Norwood should be required to pay interest in the amount of 18 percent per annum from the time of the original bill in 1998. Norwood disagreed, contending that the CTC filing required use of the prime rate.[107] Norwood also claimed that the 18 percent rate is taken from a tariff provision applicable to delinquent customer bills, which is not the case here, where Norwood contested the filing. However, the Judge stated that Norwood's position regarding interest has been rejected by the Massa

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[106] *Town of Norwood, Massachusetts v. National Grid USA*, 107 FERC ¶ 63,041 at P 97, 109-110 (2004).

[107] Norwood cited 18 C.F.R. § 35.19a.

chusetts Appeals Court,[108] and the Commission did not set the interest issue for hearing. Accordingly, the Judge rejected Norwood's position and found that the issue of the appropriate interest rate was controlled by the outcome of the Massachusetts litigation.

b. Positions of the Parties on Exceptions

77. Norwood again challenges the 18 percent interest rate, claiming that the state court decision cited by the Judge relied on an erroneous statement that the Commission had accepted that rate. Norwood also asserts that state courts cannot set any part of a Commission jurisdictional filed rate and that the interest rate is an integral part of the rate. Moreover, claims Norwood, adoption of a state court judgment from March 2001 is inconsistent with the snapshot approach the Judge used to determine other elements of the CTC, which focused on the date of termination of the service.

78. Norwood argues that the CTC provides that interest must be determined under 18 C.F.R. § 35.19a and allows a customer payment schedule options.[109] It also claims that the tariff requires that the CTC must be determined on a net present value basis, with the difference between "R" and "M" discounted to the early termination date.[110] According to Norwood, New England Power itself previously calculated the monthly level charge payable over the 10-year, seven-month period, along with interest at the refund rate in effect under the Commission's regulations at the time of the early termination date, which was eight percent.[111]

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[108] The Judge cited New *England Power Co. v. Town of Norwood,* Case 01-P1467, slip op. at 6 (Mass. App. Ct. 2003), *further appellate review denied* 799 N.E.2d 594 (Mass. 2003), *cert. denied,* 2004 U.S. LEXIS 3861 (2004).

[109] Norwood cites Ex. NOR-8 at 8.

[110] *Id.* at 10.

[111] Norwood cites Ex. NEP-1 at 36-37.

79. Respondents support the Judge's determination that the applicable interest rate is outside the scope of this hearing. They contend that Norwood and Staff did not challenge this conclusion and that Staff offers no explanation for its change in position at the exceptions stage concerning whether the issue had been decided. Even assuming that the issues of the interest rate and whether it has already been decided are properly part of the hearing, Respondents contend that Norwood and Staff failed to prove that application of the Tariff No. 1 late payment interest rate was unjust or unreasonable.

80. Staff asserts that the Judge erred in concluding that the interest rate on the unpaid CTC charges has been resolved elsewhere. According to the Staff, the Judge determined that the interest rate is not a component of the CTC formula and was not identified by the Commission as an issue for this hearing, yet she addressed the issue anyway. In reaching this decision, continues Staff, the Judge did not rely on the record, but instead relied on a decision of a state court. However, Staff acknowledges that the 18 percent interest rate to which Norwood objects is not authorized by the tariff amendment filed with the CTC. Staff asserts that, in determining the interest to be paid on the CTC, the Commission is not bound by the Massachusetts court's decision, and the Commission should determine the interest rate applicable to the CTC, which has not been adjudicated. Staff points out that Term N from the CTC filing clearly addresses this issue, providing that the appropriate rate of interest is determined pursuant to Commission Rule 35.19a.[112]

c. Commission Analysis

81. The Commission reverses the Judge's determination that 18 percent is the proper interest rate. The Commission did not set the issue of the applicable interest rate for hearing in this proceeding because the tariff clearly addresses that

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[112] Staff cites Ex. NEP-2, Attachment A, p. 1 of 6.f

issue. The relevant provision of the CTC tariff amendment adopted by the Commission, Term N of New England Power's Tariff No. 1 provides that

> The Contract Termination Charge shall be payable in equal monthly installments of principal and interest, the first payment to be made within 30 days after the date of termination of service ("Early Termination Date"), over the remaining term of the Customer's notice period (or such shorter term, or in a single payment, as agreed by the Company and the Customer). The Customer's payments shall include carrying charges on the unpaid amount of the Contract Termination Charge at the interest rate determined pursuant to section 35.19a of the Commission's regulations (18 C.F.R. 35.19a) effective on the Early Termination Date and compounded monthly.

82. The last sentence of this provision clearly establishes the interest rate applicable to the Norwood CTC. Conversely, the tariff provision that establishes an 18 percent interest rate[113] is applicable to a customer's failure to pay its bills for monthly service, which is not the situation here, where a customer is required to pay a contract termination charge when it terminates service from New England Power prior to the end of the contract term.

2. Refund Effective Date

83. In the Hearing Order, the Commission established February 21, 2003, as the refund effective date, as required by FPA section 206(b). The ID does not address the refund effective date.

a. Positions of the Parties on Exceptions

84. Norwood maintains that the Commission has the authority to correct bills for past CTC charges from the effective

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[113] Provision J, Billings and Payment, of Schedule I, Tariff No. 1.

date of the rate, which was March 31, 1998. However, Norwood emphasizes that New England Power is not entitled to collect any CTC before the refund effective date.[114]

85. Respondents claim that the ID does not address the Commission's establishment of February 21, 2003, as the refund effective date, although under FPA section 206, the Commission may only require CTC adjustments payable from and after the refund effective date. Because Norwood delayed almost five years before filing the complaint, Respondents argue that, even if the Commission determines that any reduction in the CTC is appropriate, it can only require such reductions payable after the refund effective date. If the Commission decides to require any adjustments to the CTCs charged to Norwood since April 1, 1998, Respondents claim the Commission must explain which monthly CTCs are affected by the ruling.

86. Staff points out that the Commission did not set for hearing the question of the effect of the refund effective date. Staff argues that at the time of the Norwood CTC filing, the total amount of the CTC was unknown, as were the monthly installments necessary to meet the obligation. Staff maintains that the refund effective date provision protects a customer who is in a continuing service relationship with a utility even though the customer must pay a disputed rate during the pendency of a proceeding to determine the justness and reasonableness of the rate. Staff states that, if Norwood pays in one payment the amount the Commission determines to be due New England Power, it will have met its obligation, and the refund effective date provision will not be violated.

b. Commission Analysis

87. The language in the Hearing Order concerning a refund date is mandated by the FPA. In this case, because no refunds

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[114] Norwood cites *Arkansas Louisiana Gas Co. v. Hall,* 453 U.S. 571, 577-79 (1981).

are due, the refund effective date is not relevant. Norwood's CTC is determined on the basis of a snapshot in time, which is the date of the contract termination. Norwood must now pay in monthly installments or in a lump sum the balance of the CTC plus interest owed to New England Power as determined in this order.

3. Filed Rate and *Mobile-Sierra* Doctrines

a. Positions of the Parties on Exceptions

88. New England Power argues that because the CTC is a formula rate, it could bill any components of the CTC rate that it desired and that no components need be approved. Further, argued New England Power, even if the Commission changes the components in a section 206 proceeding, they may only be changed after the refund effective date established by the Commission in the Hearing Order. Norwood rejects New England Power's claim that the CTC is a formula rate, instead contending that the CTC is a rate that establishes a fixed, one-time obligation.

89. Respondents acknowledge that, if the Commission determines that a utility has incorrectly computed a charge based on an approved formula rate, it may order refunds to correct that miscalculation; however, the Commission cannot change the formula itself retroactively (that is, going back before the refund effective date).[115] Respondents state that the Judge did not determine that New England Power had improperly applied the CTC formula rate; rather, she found that two provisions of the CTC formula itself are not just and reasonable, so that Norwood's CTCs should be calculated in a manner that departs from the filed rate. This requires a change in the filed rate, the CTC formula itself.

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[115] Respondents cite *Alabama Electric Coop., Inc. v. Alabama Power Co.*, 5 FERC ¶ 61,274 at 61,599 (1978).

90. Respondents maintain that the Commission's statement that it "accepted" but did not "approve" the CTC formula does not entitle Norwood to any greater relief. Respondents assert that two courts have ruled that the CTC formula is part of the tariff and is the filed rate. They argue that the Court of Appeals rejected Norwood's claim that the filed rate doctrine does not apply to the CTC formula, stating that it is the filing of the tariff, not the Commission's review or approval of it, which triggers the filed rate doctrine. Respondents further state that the court also observed that the Commission addressed Norwood's challenges to the CTC formula and found the CTC to be in principle a reasonable recovery of expected revenues less avoided costs.[116]

91. Norwood argues that the power contract between it and New England Power provided that any conflict between the contract provisions and the tariff provisions would be governed by the contact.[117] Norwood reasons that, because it never elected to make the CTC part of its contract with New England Power, the CTC is void under the *Mobile-Sierra* doctrine.[118] Norwood also contends that the Judge erred by granting a motion to strike testimony that showed that Norwood declined to accept the CTC because it was so much higher than the affiliates' CTCs.

92. Respondents submit that the court rejected the argument that the CTC violates the *Mobile-Sierra* docne.[119] Thus, they contend that the Judge properly struck the testimony concerning an argument that was already foreclosed.

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[116] Respondents cite *Town of Norwood, Massachusetts v. FERC*, 202 F.3d 392, 419 (1St Cir. 2000).

[117] Norwood cites Ex. NOR-4 at 12, 15; Ex. NOR-1 at 24.

[118] Norwood cites *United Gas Pipeline Co. v. Mobile Gas Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Power Co.*, 350 U.S. 348, 355 (1956).

[119] Respondents cite *Town of Norwood, Massachusetts v. FERC*, 202 F.3d 392, 400 (1st Cir. 2000).

b. Commission Analysis

93. Norwood's claim that the Judge improperly struck certain testimony has no merit. Norwood's reasons for declining to accept settlement terms as did New England Power's other customers are not relevant here. When the Commission accepted the CTC, that tariff provision controlled the calculation of the Norwood CTC, regardless of the motivation behind any decisions prior to Norwood's termination of the power contract. Likewise, the Commission rejects the contention that the CTC is void under the *Mobile-Sierra* doctrine. Any such argument was properly raised at a much earlier point, and in fact, the Commission and the court long ago clearly rejected Norwood's *Mobile-Sierra* and filed rate doctrine claims.[120]

H. Conclusion

94. Accordingly, the Commission finds that the total CTC owed by Norwood is $71,881,517,[121] plus interest calculated in accordance with the Commission's regulations. Norwood has informed the Commission that it already has paid New England Power the amount of the CTC calculated by the Judge and that New England Power has cashed the check. Norwood must pay the difference between $71,881,517 and the amount already paid to New England Power, with interest due on the $71,881,517 calculated in accordance with the Commission's regulations.

The Commission orders:

(A) The ID is affirmed in part and modified in part, as discussed in the body of this order.

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[120] *Town of Norwood, Massachusetts v. FERC*, 202 F.3d 392, 400-401 (1st Cir. 2000).

[121] *See Town of Norwood, Massachusetts v. National Grid USA*, 107 FERC ¶ 63,041 at P 70 (2004). This is the revenue that would have been attributable to Norwood less the market value of the electric power capacity determined as discussed elsewhere in this order.

(B) Within 15 days of the date of issuance of this order, New England Power must file a report with the Commission reflecting the amount of the Norwood CTC computed in accordance with this order, plus interest calculated pursuant to section 35.19(a) of the Commission's regulations.

By the Commission.

(SEAL)

Linda Mitry,
Deputy Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION
114 FERC ¶ 61,187

Docket Nos. EL03-37-002 and No. EL03-37-003

Before Commissioners: Joseph T. Kelliher, Chairman; Nora Mead Brownell, and Suedeen G. Kelly.

TOWN OF NORWOOD, MASSACHUSETTS

v.

NATIONAL GRID USA, NEW ENGLAND ELECTRIC SYSTEM, MASSACHUSETTS ELECTRIC COMPANY, and NARRAGANSETT ELECTRIC LIGHT COMPANY

ORDER ON REHEARING AND COMPLIANCE FILING

(Issued February 22, 2006)

1. In this order, the Commission addresses again the calculation of a Contract Termination Charge (CTC) applicable to the Town of Norwood, Massachusetts (Norwood) as the result of its early termination of a full requirements electric service contract with New England Power Company (New England Power)[1] so that Norwood could obtain electric power from another supplier. As discussed below, the Commission finds that the terms of the CTC must be applied as approved by the Commission in orders that have been

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[1] New England Power has been renamed National Grid USA Service Company, Inc. (National Grid) following the merger of its corporate parent. However, throughout this order, the company is referred to as New England Power.

affirmed by the courts. Norwood's position, if adopted, would alter the terms of the CTC itself.

2. In an order issued July 22, 2005,[2] the Commission affirmed in part and modified in part an Initial Decision issued by the Presiding Administrative Law Judge (ALJ) addressing the calculation of the CTC.[3] At issue was whether the CTC was unjust, unreasonable, unduly discriminatory, or preferential under section 205 of the Federal Power Act (FPA).[4] In the July 22, 2005 Order, the Commission pointed out that it previously had accepted the CTC formula, but had not accepted the individual components in New England Power's calculation. In modifying the Initial Decision, the Commission concluded that the amount owed by Norwood is $71,881,517 plus interest rather than the approximately $16.9 million calculated by the ALJ.

3. Both Norwood and New England Power filed requests for rehearing of the July 22, 2005 Order. As discussed below, the Commission denies Norwood's request for rehearing and grants New England Power's request for rehearing.

4. On August 3, 2005, New England Power submitted a compliance filing as required by the July 22, 2005 Order. Norwood filed objections to the filing. As discussed below, the Commission rejects the compliance filing because it is granting New England Power's request for rehearing.

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[2] *Town of Norwood, Massachusetts v. National Grid USA*, 112 FERC ¶ 61,099 (2005).

[3] *Town of Norwood, Massachusetts v. National Grid USA*, 107 FERC ¶ 63,041 (2004).

[4] 16 U.S.C. § 824d (2000).

I. Background

5. The lengthy background of this proceeding prior to issuance of the ID is thoroughly recounted in the ID[5] and the July 22, 2005 Order[6] and will not be repeated here. In the July 22, 2005 Order, the Commission adopted the findings of the ALJ to the extent the Commission affirmed the ID.

6. The CTC formula at issue here is as follows: CTC = (R-M) x L, where "R" is New England Power's annual revenues from Norwood, "M" is the estimated market value of Norwood's released capacity, and "L" is the remaining length of the contract obligation, in this case, from April 1, 1998, through October 2008 in accordance with Norwood's decision to terminate its service from New England Power. As discussed below, there is also a cap on the amount that Norwood is required to pay New England Power.

7. More specifically, the "R" factor is the amount of revenue that New England Power was receiving from Norwood at the time of the termination under Commission-approved rates. That revenue reflects a credit for the transmission services that Norwood bought from Boston Edison Company (Boston Edison). New England Power determined "R" based on the revenue it received from Norwood during the 12 months immediately preceding the early termination date.

8. The "M" factor used by New England Power is the market value of the power it was supplying to Norwood at the time of the early termination. The CTC formula includes a table of kilowatt hour (kWh) prices to be used in this calculation for the years 1998 through 2007 and provides that prices for 2008 and thereafter will be the prices for 2007

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[5] *Town of Norwood, Massachusetts v. National Grid USA*, 107 FERC ¶ 63,041 at P 1-14 (2004).

[6] *Town of Norwood, Massachusetts v. National Grid USA*, 112 FERC ¶¶ 61,009 at P 5-8 (2005).

escalated at two percent annually. The released load factor used by New England Power is the annual average of kWh that Norwood bought from New England Power during the 12 months preceding the early termination.

9. In the Initial Decision, the ALJ adjusted the Revenue Factor "R" component of the CTC formula, which represents the revenues New England Power was receiving from Norwood under approved rates at the time Norwood terminated the contract, less a credit for transmission payments that Norwood made to its transmission provider, Boston Edison.[7] Norwood and the Commission's Trial Staff (Staff) argued at the hearing that the total revenue component was too high because it failed to reflect a 28-percent reduction in revenues to reflect costs eliminated as a result of the divestiture of New England Power's non-nuclear generation assets. New England Power provided this reduction to its affiliated wholesale customers, Massachusetts Electric Company (Mass Electric) and Narragansett Electric Light Company (Narragansett), as the result of a settlement giving the affiliates' retail customers Standard Offer service (3.2 cents per kWh) and 1.5 cents per kWh as a CTC.[8] The ALJ reasoned that the 28-percent reduction to the "R" factor attributable to the non-nuclear divestiture was "known and measurable" and thus could have been reflected at the time that New England Power sought Commission approval of its application for the Norwood CTC and that it was consistent with New England Power's pledge in the divestiture proceeding that it would share the proceeds of its non-nuclear generation facilities with its unaffiliated wholesale customers to reduce stranded costs.[9] Accordingly, the ALJ reduced the "R" factor by 28 percent and determined that, after deducting for the estimated Market Value "M" of

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[7] *Id.* at P 13-31.

[8] *Id.* at P 19, 28, and n.32.

[9] *Id.* at P 16.

the released capacity and energy, the Norwood CTC should be $16.9 million.[10]

10. In the July 22, 2005 Order, the Commission reversed the ID with respect to the 28-percent reduction to the "R" factor. The Commission did so because the reduction was not consistent with the approved CTC fomula.[11] The Commission pointed out that the Norwood CTC formula specifically provides for certain types of adjustments, but does not provide for an adjustment to reflect the divestiture of certain facilities.[12] Accordingly, the Commission determined that the correct "R" factor should be $196,270,432, less $124,824,796 for the estimated Market Value "M" of the released capacity and energy, resulting in a CTC of $71.9 million.[13]

11. In the July 22, 2005 Order, the "R" factor also was at issue in the determination of the CTC Cap, which is the maximum CTC that Norwood can be obligated to pay.[14] Specifically, the CTC Cap requires that the difference between the adjusted revenues "R" under the contract and the estimated Market Value "M" of the released capacity and energy cannot exceed the departing customer's contribution to New England Power's fixed power supply costs under its tariff.[15] The Norwood CTC formula calculates the customer's contribution as the difference between the departing customer's Total Revenue minus the Transmission Revenue and minus New England Power's average fuel costs multiplied by

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[10] *Id.* at P 71.

[11] *Id.* at P 32.

[12] *Id.* at P 33.

[13] *Id* In fact, the difference between the $16.9 million CTC calculated by the ALJ and the $71.9 million CTC established in the July 22, 2005 Order ($55.0 million) is equal to the total revenue of $196.3 million times 28 percent.

[14] *Id.* at P 57.

[15] *Id.* at P 60.

the customer's monthly kWh purchases during the period over which Total Revenue is determined.[16] The ALJ calculated $25,403,742 as the appropriate CTC Cap, based on a *pro rata* share of New England Power's estimated remaining fixed costs after divestiture of the non-nuclear facilities[17] However, the Commission calculated the CTC Cap based on the CTC formula and reflecting Norwood's $14,927,508 per year contribution to New England Power's fixed costs under approved tariff rates, or $158 million over the more than 10 years remaining in the term of the service agreement.[18] Because the $158 million was greater than Norwood's CTC of $71.9 million, the Commission determined that the CTC Cap would not lower Norwood's CTC.[19]

12. New England Power contended that Norwood should be required to pay interest at the rate of 18 percent per year on the unpaid CTC amount from the date of the original CTC bill in May 1998.[20] Norwood disagreed, contending that the CTC requires use of the prime rate.[21] Norwood maintained that the 18-percent rate is established in a tariff provision applicable to delinquent customer bills, but not applicable to a case such as this. However, the ALJ ruled that the Massachusetts Appeals Court had rejected Norwood's position, and she found the outcome of the Massachusetts litigation to be controlling on this issue.[22] On exceptions, Norwood argued that the CTC provides that interest must be determined under 18 C.F.R. § 35.19a, and the tariff affords the customer pay-

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[16] *Id.*

[17] *Id.* at P 108.

[18] *Id.* at P 75.

[19] *Id.* at P 75.

[20] *Id.* at P 76.

[21] *Id.*

[22] *Id.*

ment schedule options.[23] In the July 22, 2005 Order, the Commission reversed the ID, concluding that the CTC establishes that the interest rate must be calculated in accordance with 18 C.F.R. § 35.19a, i.e., the prime rate.

13. While the ID was pending before the Commission on exceptions, Norwood sought to conclude the litigation by sending New England Power a check for $20,356,994.35 on July 22, 2004.[24] However, in the July 22, 2005 Order, the Commission ordered Norwood to pay the difference between $71,881,517 and the amount already paid to New England Power, plus interest.[25] The Commission also directed New England Power to file a report reflecting the amount of the CTC due from Norwood with interest calculated in accordance with 18 C.F.R. § 35.19a.

II. Compliance Filing And Responsive Pleadings

14. On August 3, 2005, New England Power submitted its compliance filing in response to the July 22, 2005 Order) Notice was published in the Federal Register (70 Fed. Reg. 48,698 (August 19, 2005)), with interventions, comments, and protests due on or before August 22, 2005. On August 22, 2005, Norwood filed objections to the compliance report. On September 6, 2005, New England Power filed an answer to Norwood's objections. On September 16, 2005, Norwood filed a motion to reject New England Power's answer.

15. On August 19, 2005, both Norwood and New England Power filed requests for rehearing of the July 22, 2005 Order. On August 31, 2005, Norwood filed a notice and request to respond to New England Power's request for rehearing. On September 6, 2005, New England Power filed an answer to

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[23] *Id.* at P 77.

[24] *Id.* at n.13. The amount includes $2,349,623.35 of interest from April 1, 1998, through June 30, 2004.

[25] *Id.* at P 94.

Norwood's request for rehearing. On September 12, 2005, Norwood filed an answer to New England Power's answer to Norwood's request for rehearing. On September 16, 2005, Norwood filed a motion to submit recent authority. On September 28, 2005, New England Power filed an answer to Norwood's motion to submit recent authority.

III. Discussion

A. Procedural Matters

16. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2005), prohibits an answer to a protest or to a request for rehearing unless otherwise ordered by the decisional authority. In this case, the Commission is not persuaded to accept the responsive pleadings filed by New England Power and Norwood in either docket addressed by this order.

B. Requests for Rehearing

1. Norwood's Request for Rehearing

17. According to Norwood, the FPA does not allow for charges that exceed New England Power's actual contract losses.[26] However, argues Norwood, the Commission derived the "R" and "M" factors inconsistently and incorrectly applied the CTC Cap, resulting in a CTC that exceeds New England Power's actual costs.

18. Norwood asserts that the Commission did not compute the CTC components correctly when it failed to account for New England Power's sale of the electric generating plants supporting the service to Norwood. Additionally, Norwood argues that the Commission should have used actual market prices in calculating the CTC formula. It maintains that the

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[26] Norwood cites *Acker v. United States*, 298 U.S. 426 (1936); *El Paso Natural Gas Company v. FPC*, 281 F.2d 567 (5th Cir. 1960); *Midwestern Gas Transmission Company. v. FPC*, 388 F.2d 444 (7th Cir. 1968).

market values of released capacity and energy have been above the contract price that was effective when it terminated service.

19. Further, states Norwood, the Commission erroneously rejected the ALJ's adjustment to the "R" factor, basing its ruling on its finding that the CTC does not provide for such an adjustment, as well as on the fact that Norwood failed to settle with New England Power and, therefore, is not entitled to the same CTC treatment. Norwood asserts that this is incorrect because New England Power was willing for it to depart, but only on terms that would require Norwood to pay substantially more than New England Power's affiliates. However, continues Norwood, the Commission has the authority to make an adjustment to preclude unjust, unreasonable, discriminatory, or preferential rates.[27] According to Norwood, "The fundamental theory of Commission ratemaking is that costs should be recovered in the rates of those customers who utilize the facilities and thus cause the costs to be incurred."[28] Norwood further points out that, in Order No. 888,[29] the Commission stated that, "If a stranded cost claim

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[27] Norwood cites 16 U.S.C. §§ 824d, 825h; Permian Basin Area Rate Cases, 390 U.S. 747 (1968).

[28] Norwood cites Northern States Power Company, 64 FERC ¶ 61,324 at 63,379 (1993) (emphasis in original); *Indiana & Michigan Mun. Distribs. Ass'n v. Indiana Michigan Power Company*, 59 FERC ¶ 61,260 at 61,956 (1992); *Alabama Elec. Coop. v. FERC*, 684 F.2d 20, 27-29 (D.C. Cir. 1982).

[29] Norwood cites Promoting Wholesale Competition Through Open Access Nondiscriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540, FERC Stats. & Regs. [Regulations Preambles, January 1991-June 1996] 31,036 at 31,785, 31,790-91, 31,842 (1996), clarified, 76 FERC ¶ 61,009 (1996), modified, Order No. 888-A, 62 Fed. Reg. 12,274 (March 4, 1997), FERC Stats. & Regs. [Regulations Preambles, July 1996-December 2001] 31,048, order on reh'g Order No. 888-B, 62 Fed. Reg. 64,688, 81 FERC ¶ 61,248 (1997), *aff'd in part and remanded in part sub nom. Transmission Access Policy Study Group v.*

involves divestiture of assets, the amount of stranded costs would be the book value less the sale price." Norwood contends that, because the CTC formula is derived from and parallels Order No. 888's stranded cost formula, the Commission erred when it found that the CTC formula does not permit consideration of New England Power's asset divestiture revenue.

20. Norwood challenges the Commission's determination that New England Power was not required to offer Norwood the same settlement package that New England Power offered to its affiliates. Additionally, Norwood argues that New England Power's willingness to accept revenue reductions from its affiliates is a clear admission that New England Power is receiving compensation through the plant sale revenues and that the "R" factor applied to Norwood is overstated. Norwood contends that its witness testified that the standard offer service given to New England Power's affiliates is approximately 40 percent lower than the frozen rates offered Norwood.[30] Thus, Norwood reasons that the ALJ's 28-percent reduction in the "R" factor is necessary to achieve just and reasonable rates under the CTC and to avoid undue preference and discrimination.

21. Norwood submits that, if the "R" factor is not reduced, the Commission must either adjust the "M" factor or reduce the CTC Cap to account for market values. Norwood claims that New England Power's market value estimates were not made in accordance with Order No. 888, so they do not represent actual market sales prices and must be rejected. According to Norwood, given the lack of a testable New England Power market study and Norwood's inability to protect itself by marketing the released power itself, the most sensible approach would be to base the "M" component on

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FERC, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002), *order on reh'g*, Order No. 888-C 61,046 (1998).

[30] Norwood cites E. NOR-1 at 14.

actual market conditions. According to Norwood, by considering the sale value of Norwood's plants, the use of an "M" factor that reflects market conditions would eliminate the CTC charges.[31] In the alternative, continues Norwood, use of the purchaser's forecast price of generation for the "M" factor would reflect future expectations relating to the output of the purchased assets and would reduce the CTC (without interest) to $19.5 million.[32]

22. Norwood next contends that the purpose of the CTC Cap should be to prevent the CTC from exceeding New England Power's actual costs. Norwood argues that it should not be treated as having contributed to fixed power supply costs for facilities that New England Power sold at a profit, and further, that New England Power's divestiture of the non-nuclear generation and power supply contracts and the eventual divestiture or closure of the nuclear units meant that New England Power no longer had fixed power supply costs relating to these facilities. Indeed, Norwood asserts that New England Power's plant sale is what led Norwood to terminate its contract. Norwood claims that, under New England Power's existing rate, adjusted to eliminate fixed costs of the divested plant, Norwood's contribution to New England Power's remaining fixed costs would be $18.3 million in as-billed dollars, equivalent to a capped contribution of $12.5 million as of April 1, 1998.[33]

23. Norwood also argues that two other errors should be corrected in applying the CTC formula. First, Norwood states that the rate of return in the "R" component should be adjusted to reflect the fact that New England Power was earning a return far above the allowed return. Norwood also submits that the J's higher recommended transmission adjust-

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[31] Norwood cites E. NOR-38 at 7-8.

[32] Norwood cites E. NOR-9 at 24; E. NOR-14 at 1.

[33] Norwood cites E. NOR-30 at 12-16; E. NOR-32.

ment of $1,390,785 to the "R" factor should have been used to offset the amounts that it was required to pay Boston Edison for transmission service. Norwood asserts that the transmission adjustment in the CTC formula and in Order No. 888's stranded cost formula is intended to account for the fact that jurisdictional companies can continue to collect transmission costs when customers leave their transmission systems. However, Norwood contends that power from the divested plants continues to be sold, and the transmission systems of New England Power and Boston Edison continue to be used. Thus, Norwood maintains that the Commission should deduct the full amount of transmission costs allocable under New England Power's tariff so that the CTC reflects only displaced generation costs.

24. Norwood states that there is no dispute that New England Power has been made whole; therefore, the result of the July 22, 2005 Order is unreasonable under the FPA. According to Norwood, although that order states that it permits New England Power to recover the revenues it would have collected had Norwood continued to pay the fixed tariff rate through the contract term,[34] the charge does not reflect actual service provided and any actual costs (or losses) attributable to Norwood's departure from the system.

25. Norwood contends that the Commission's only stated issue in this case is the justness and reasonableness of the CTC components filed by New England Power; therefore, the Commission need not go outside of the CTC formula.[35] However, Norwood asserts that, because the CTC components are based on estimates, the Commission should consider whether New England Power actually suffered economic harm or whether the "R" factor reflects actual revenues

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[34] *Town of Norwood, Massachusetts v. National Grid USA*, 112 FERC ¶ 61,009 at P 2, 9 (2005).

[35] *Id.* at P 8-9, 56, 74.

and market conditions.[36] Norwood also complains that the Commission refused to update New England Power's estimates and interpreted past decisions as not permitting examination of whether the results are consistent with actual cost incurrence and lost revenues. According to Norwood, the July 22, 2005 Order implies that, if the results of the Commission's order can be derived from the tariff, the Commission need not consider whether those results are reasonable, justifiable, or consistent with the facts presented.

26. Norwood claims that the Commission must consider contrary evidence that is introduced, as well as the magnitude of the disparity between expectations and reality. For example, Norwood points out that the Court of Appeals for the First Circuit has made it clear that a regulator is not rigidly bound to test-year formulas when later information reveals that the estimates based on those figures are likely to be seriously in error.[37] Norwood further claims that, if it can be shown that the imposition of a tariff formula will conflict with basic statutory requirements, the statute takes preference. Norwood maintains that the Commission has not provided a rational explanation for its departure from its own regulations, procedures, and precedents.

27. Norwood also contends that the Commission's May 15, 1998 Order accepting the CTC amendment simply gave Norwood an option to terminate its service by paying an exit fee equal to the revenues that it would have paid under its contract, less the market value of its power.[38] However, claims Norwood, the Commission is not barred from making certain that the components of the formula make New

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[36] *Id.* at P 32, 55.

[37] Norwood cites *Distrigas of Mass. Corp. v. FERC*, 737 F.2d 1208, 1220, *vacated on other grounds*, 751 F.2d 20 (1st Circuit 1984).

[38] Norwood cites *Town of Norwood, Massachusetts v. National Grid USA*, 112 FERC¶ 61,009 at P 33 (2005).

England Power no more than whole. Norwood also states that the Commission may depart from prior orders where necessary to reach correct results or even to change its policy.[39]

28. Finally, while it concedes that the Commission has the authority to interpret jurisdictional contracts, Norwood points out that it is not a jurisdictional public utility under the FPA, so the Commission does not have the authority to order it to issue a check.[40] According to Norwood, even if the Commission can order it to pay money to New England Power, this authority would be limited to ordering payments that are not in excess of New England Power's actually-incurred damages from Norwood's termination of a jurisdictional contract, i.e., amounts equal to contract damages, but no more.[41]

2. Commission Analysis

29. The Commission denies Norwood's request for rehearing. Norwood raises issues on rehearing that have been resolved by the Commission and the courts or otherwise have no merit. Norwood's request for rehearing is simply a collateral attack on those earlier decisions.

30. The United States Court of Appeals for the First Circuit foreclosed many of the arguments Norwood raises here when the court affirmed the Commission's orders accepting the CTC.[42] First, the court determined that the Commission's stranded cost regulations did not preclude the Commission from approving the tariff amendment that affords New

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[39] Norwood cites *Clark Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074, 1078-80 (D.C. Cir. 1987).

[40] Norwood cites 16 U.S.C. § 824 (f) (2000).

[41] Norwood cites *United Gas Pipeline Company v. Mobile Gas Service Corp.*, 350 U.S. 332 (1956); *FPC v. Sierra Pacific Power Co.*, 350 U.S. 348 (1956); *Town of Norwood v. FERC*, 202 F.3d 392, 400 (2000); *Arkansas Louisiana Gas Company v. Hall*, 455 U.S. 571, 578-9 (1981).

[42] *Town of Norwood, Massachusetts v. FERC*, 202 F. 3d 392 (1st Cir. 2000), *cert. denied*, 531 U.S. 818 (2000).

England Power a similar recovery whenever a customer terminates an existing contractual obligation, as Norwood did when it unilaterally terminated its service agreement with New England Power so that it could obtain service from another provider.[43] Further, the court pointed out that Norwood was not being asked to pay more for past purchases than provided by the tariff in effect at the time of the purchases; rather that the CTC gave Norwood an option to terminate the contract that it did not have before.[44]

31. Norwood also argued before the court that New England Power had not supplied data to show that it is just and reasonable to require Norwood to pay a CTC that could amount to as much as $78 million, a sum Norwood calculated by projecting the termination charges from April 1, 1998, through the expiration of the contract term. However, the court emphasized that the CTC was merely a formula-driven charge to cover certain projected losses to New England Power based on rates already approved by the Commission. The court observed that Norwood had not demonstrated that the charges were miscomputed or unsupported. Further, the court recognized that, even though the Commission had not established a hearing concerning the CTC, Norwood could file a complaint, as it has done in this proceeding.[45]

32. Additionally, the court affirmed the Commission's holding that differences in circumstances justified a different CTC for Norwood than for New England Power's affiliates. The court agreed with the Commission that the CTC was not unjust or unreasonable merely because it differed from the CTCs applied to entities that settled. The court pointed out that Norwood declined the opportunity to settle its CTC. Indeed, in its March 15, 1998 filing, New England Power

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[43] *Id.* at 398-99.

[44] *Id.* at 399-400.

[45] *Id.* at 401.

stated that it would be willing to negotiate termination agreements on terms other than those provided in this CTC amendment.[46] The court further pointed out that New England Power explained that the settlement CTCs were based on disputable estimates, while the Norwood CTC was based on more readily calculable figures relating to estimated purchases under the contract, less estimated avoided costs.[47]

33. Addressing Norwood's contention that its CTC was unjust and unreasonable because Norwood was not offered the standard offer rates offered to the affiliates, the court emphasized that New England Power's affiliates were obligated to offer retail standard offer rates to their customers and consequently required dovetailed wholesale standard offer rates from their supplier. The court explained that Norwood was not similarly situated because it had no comparable obligation.[48]

34. The Commission points out that the court's decision indicates that Norwood itself recognized that the CTC would amount to approximately $78 million,[49] which seems inconsistent with Norwood's present assertion that the CTC of approximately $72 million plus interest is excessive. Further, while Norwood now expresses concern with the monetary effect on its individual customers, Norwood has failed to present its arguments in a timely or persuasive manner at appropriate junctures through the years since New England

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[46] New England Power Company, FERC Electric Tariff, Original Volume No. 1, Amendment to Tariff, Docket No. ER98-2233-000 (March 18, 1998).

[47] *Town of Norwood, Massachusetts v. FERC*, 202 F. 3d 392, 401-02 (1st Cir. 2000).

[48] *Id* at 402-03.

[49] *Id.* at 401. See also *Town of Norwood, Massachusetts v. National Grid USA*, 10[illegible] FERC ¶ 61,030 at P 10 n.13 (2003).

Power filed the CTC. The Court of Appeals was not reticent about chiding Norwood in this regard.[50]

35. Most importantly, the court found that the Norwood CTC is derived merely from the application of a formula. Thus, if Norwood wished to challenge the formula, it should have done so at the time New England Power filed the CTC amendment in 1998. While Norwood filed a motion with the Commission asking it to reject the original CTC filing, Norwood did not request a hearing where it would have had the opportunity to test the justness and reasonableness itself, instead preferring to rest its hopes on the federal judicial system, which ultimately ruled against it.[51] All of the previous Commission proceedings and court decisions addressing Norwood's departure as a customer and the CTC applicable to it are final and non-appealable.

36. In the July 22, 2005 Order, the Commission correctly found that the ALJ's 28-percent adjustment to the "R" factor, which would reflect the divestiture of the facilities, is not an element of the Norwood CTC formula.[52] That finding is consistent with the court's determination that calculation of the Norwood CTC is accomplished by application of the formula set out in the CTC amendment.[53]

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[50] *See, e.g., Town of Norwood, Massachusetts v. FERC*, 202 F.3d 392, 401-02, 403 n.8, 404 and n.9, 405 (1st Cir. 2000); *Town of Norwood, Massachusetts v. New England Power Co.*, 202 F.3d 408, 412 n.2, 415, 417, 421, 422 (1st Cir. 2000); *Town of Norwood, Massachusetts v. FERC* ¶ 217 F.3d 24, 27-28 (1st Cir. 2000).

[51] England Power Co., 83 FERC ¶ 61,174 at 61,723, *reh'g denied*, 84 FERC ¶ 61,175 (1998); *affirmed, Town of Norwood, Massachusetts v. FERC*, 202 F.3d 392 (1st Cir. 2000), *cert. denied*, 531 U.S. 818 (2000).

[52] *Town of Norwood, Massachusetts v. FERC*, 112 FERC ¶ 61,099 at P 32 (2005).

[53] *Town of Norwood, Massachusetts v. FERC*, 202 F.3d 392, 401 (1st Cir. 2000).

37. Moreover, the Commission properly rejected Norwood's claim that it was not afforded the same opportunity to settle its CTC as were the affiliates. The Commission cited the court's recognition that New England Power had offered to negotiate a similar termination agreement with Norwood, which Norwood had declined.[54] As stated above, the court rejected the notion that Norwood was the victim of undue discrimination because the affiliates obtained standard offer service.[55]

38. Likewise, the Commission properly affirmed the ALJ's calculation of the "M" factor.[56] Norwood errs in claiming that, because the market value estimates were not made in accordance with Order No. 888, they do not represent actual market sales prices and must be rejected. Order No. 888 does not control.[57] As stated above, the CTC formula was

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[54] *Town of Norwood, Massachusetts v. FERC* 112 FERC ¶ 61,099 at P 51-53 and n.80 (2005).

[55] *Town of Norwood, Massachusetts v. FERC* 202 F. 3d 392, 401-402 (1st Cir. 2000).

[56] *Town of Norwood, Massachusetts v. FERC* 112 FERC ¶ 61,099 at P 40-41, 51-56 (2005).

[57] The court accepted the Commission's position that Order No. 888 does not apply in this case:

> [T]here is a separate (although parallel) justification for stranded cost recovery in the present case: Norwood as a requirements-contract customer of power furnished by New England Power is being afforded an option to switch immediately to a competing supplier, without the seven years' notice required by the contract. New England Power Co., 83 FERC ¶ 61,174 at 61,722-23 (1998). In short, there is a different reason for similar relief; and while Order No. 888 does not mandate the new tariff, neither does it forbid it. See Order No. 888, 61 Fed. Reg. at 21662 (reserving the possibility of stranded cost recovery in other situations. . . .
>
> [T]he restrictions in Order No. 888 are no more than conditions on stranded cost recovery under that order and do not preclude the Commission from allowing tariffs that permit somewhat similar

established in New England Power's March 18, 1998 filing, which the Commission accepted, and the court affirmed the Commission's orders. Norwood's belated challenge to the CTC formula must be rejected.

39. The Commission also correctly modified the ALJ's calculation of the CTC Cap, finding that she had not calculated it in accordance with the CTC formula. Again, the Commission relied on the CTC formula accepted by the Commission and affirmed by the court. In the July 22, 2005 Order, the Commission determined that the CTC Cap is $157,982,793, and because that amount is higher than the CTC amount of $71,881,516, the cap would not lower Norwood's CTC.[58]

40. Norwood's challenge to the rate of return also lacks merit. As the Commission determined in the July 22, 2005 Order, the ALJ sufficiently addressed this issue;[59] therefore, the Commission affirmed the ALJ's determination. On rehearing, Norwood raises no new arguments relating to the rate of return. Similarly, Norwood fails on rehearing to demonstrate that the Commission erred in summarily affirming the ALJ's application of the proper factor in determining the deduction for transmission revenues.

41. Norwood contends that New England Power should not be entitled to recover from the CTC more than its actual losses. However, for a variety of reasons including rate certainty, cost-based ratemaking is not limited to recovery of actual cost and the CTC formula accepted by the Commission

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recovery whenever a customer purports to disregard an existing contractual obligation.

Town of Norwood v. FERC, 202 F.3d 392, 399 (1st Cir. 2000).

[58] *Town of Norwood, Massachusetts v. National Grid USA*, 112 FERC ¶ 61,099 at P 74-75 (2005).

[59] *Town of Norwood, Massachusetts v. National Grid USA*, 107 FERC ¶ 63,041 at P 76-79 (2004).

and affirmed by the Court of Appeals does not include such a limitation. The court recognized that "[i]t is a formula-driven charge to cover certain projected losses to New England Power caused by not supplying electricity after preparing to do so, calculated based on rates already approved by FERC."[60] The Commission has ample discretion to accept a rate formula.[61] Both the Commission and the court have found the Norwood CTC formula to be just and reasonable,[62] and Norwood has not demonstrated that the Commission failed to follow the formula in determining the CTC. Balanced against Norwood's desire to terminate the contract several years in advance of the expiration of the contract term and the fixed, predictable nature of the formula, the fact that the CTC might, as Norwood claims, exceed New England Power's actual monetary losses does not render the CTC unjust and unreasonable. The Commission concludes that Norwood, as the complainant, has not met the burden of proof necessary to demonstrate that the CTC is unjust and unreasonable.

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[60] *Town of Norwood, Massachusetts v. FERC*, 202 F.3d 392, 401 (1st Cir. 2000).

[61] See, e.g., *Public Utilities Commission of the State of California v. FERC*¶ , 254 F.3d 250, 254 (D.C. Cir. 2001) ("It can hardly be doubted at this late date that the Commission 'need not confine rates to specific, absolute numbers but may approve a tariff containing a rate `formula' or a rate `rule'. . . .' *Transwestern Pipeline Co. v. FERC*, 283 U.S. App. D.C. 116, 897 F.2d 570, 578 (D.C. Cir. 1990).")

[62] In its order accepting the CTC, the Commission stated as follows:

> The proposed formula for calculating the CTC would recover the revenues lost over the existing seven-year notice term, less an estimate of the market value of the released capacity. Payment of the full demand charges over the remainder of the contract term would thus be avoided. Under the circumstances presented, we find the proposed amendment to be reasonable and therefore will accept it." (footnote omitted).

42. Finally, Norwood contends that the Commission does not have jurisdiction to require Norwood to pay the CTC to New England Power. This argument clearly has no merit. The Court of Appeals left no doubt that the Commission did not err in adopting the Norwood CTC and that Norwood is obligated to comply with it.

3. New England Power's Request for Rehearing

43. New England Power contends that the Commission misread its tariff concerning interest on late payments. New England Power points out that, in addition to the tariff provision cited in the CTC, on which the Commission relied (Term N of New England Power's Tariff No. 1),[63] the tariff also requires Norwood to pay additional charges on late payments (New England Power's Tariff No. 1, Schedule I at 7).[64]

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[63] New England Power Company, FERC Electric Tariff, Original Volume No. 1, Original Page No. 4 provides as follows:

> The Contract Termination Charge shall be payable in equal monthly installments of principal and interest, the first payment to be made within 30 days after the date of termination of service ("Early Termination Date"), over the remaining term of the Customer's notice period (or such shorter term, or in a single payment, as agreed by the Company and the Customer). The Customer's payments shall include carrying charges on the unpaid amount of the Contract Termination Charge at the interest rate determined pursuant to section 35.19a of the Commission's regulations (18 C.F.R. 35.19a) effective on the Early Termination Date and compounded monthly.

[64] Schedule I, page 7, section J (Billings and Payment), provides in part as follows:

> When all or part of any bill shall remain unpaid for more than thirty (30) days after the rendering thereof by the Company, interest at the rate of 1 1/2% per month shall accrue to the Company from and after the rendering of said bill and be payable to the company on either:
>
> (1) such unpaid amount or (2) in the event the amount of the bill is disputed, the amount finally determined to be due and payable.

44. New England Power explains that the CTC obligation of a customer terminating service early is first calculated as a lump sum amount under the CTC, as described above. Then, continues New England Power, the CTC formula provides for this lump sum amount to be stated on a net present value basis by discounting the difference between "R" and "M" by the refund interest rate in effect under the Commission's regulations on the date the customer terminated the service.[65] New England Power contends that the tariff formula also provides that, if a customer does not pay its total CTC obligation in one payment, New England Power will collect the CTC obligation in equal monthly installments, including carrying charges, over the remaining term of the customer's contract. New England Power emphasizes that the tariff formula converts the customer's lump sum obligation into equal monthly payments by using the same methodology that a bank uses to calculate equal monthly payments to amortize a loan and interest over a specified term. In Norwood's case, New England Power states that it calculated a monthly CTC payment of $599,971 payable from April 1998 through October 2008.[66]

44. New England Power states that it has billed Norwood $599,971 each month since April 1998, but, except for Norwood's one time payment of $20.4 million following issuance of the ID, Norwood has not paid any of these bills. New England Power explains that the CTC formula does not address the consequences of a customer's nonpayment of a bill reflecting a properly calculated CTC, but that this is unnecessary because the tariff already addresses that issue

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[65] New England Power cites E. NEP-1 at 36; E. NEP-2 at Schedule II-C at 2, § B; E. NEP-6. New England Power advises that the applicable refund interest rate as of Norwood's termination date, April 1, 1998, was eight percent and that the CTC amount of $71.9 million was discounted to $51,293,148 as of that date.

[66] New England Power cites E. NEP-6 at 1-2; E. NEP-1 at 20-21.

with no exclusion for CTC charges or any other type of bill. According to New England Power, this is consistent with a common business practice to have two separate interest rates, one applicable to a monthly payment and the other applicable to late payments.

46. New England Power points out that Norwood sought and failed to obtain relief from its CTC obligation from the Commission and the federal court. However, New England Power commenced an action in the Massachusetts Superior Court to recover the unpaid CTC bills, plus interest. New England Power emphasizes that, as the AU recognized,[67] the Massachusetts court granted New England Power's motion for summary judgment against Norwood,[68] and the Massachusetts Appeals Court affirmed the lower court's rulings.[69] New England Power argues that the July 22, 2005 Order fails to acknowledge the binding effect of these state court decisions and violates well-recognized principles of res judicata, which prevents re-litigation of an issue already resolved in an earlier action.

47. New England Power further contends that, after the state court decisions, Norwood first raised the interest rate issue in this proceeding in its post-hearing brief to the AU. However, New England Power asserts that the AU properly

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[67] New England Power cites *Town of Norwood, Massachusetts v. National Grid USA*, 107 FERC ¶ 63,041 at P 109 (2004).

[68] New England Power cites *New England Power Company v. Town of Norwood*, 2001 WL 292974 (Mass. Super. 2001); *New England Power Company v. Town of Norwood*, 2001 WL 543172 (Mass. Super. 2001).

[69] New England Power cites *New England Power Company v. Town of Norwood*, 59 Mass. App Ct. 1106, 797 N.E. 2d 26 (2003), *pet. for further review denied*, 440 Mass. 1108, 799 N.E.2d 594 (2003), cert. denied, 541 U.S. 1073 (2004).

rejected the challenge, finding that the issue already had been litigated.[70]

48. New England Power also maintains that the Commission erred in reversing the ALJ's decision because the Commission failed to give New England Power notice that the issue was to be litigated and thus deprived New England Power of due process. Finally, New England Power asserts that the Commission improperly imposed a retroactive change to the tariff, as well as permitting a prospective change to the tariff without first finding that the existing late payment provision is unjust and discriminatory.

4. Commission Analysis

49. The Commission grants New England Power's request for rehearing. In the July 22, 2005 Order, the Commission found that the Norwood CTC addressed the calculation of Norwood's CTC;[71] however, the Commission failed to address the consequences of Norwood's failure to make its CTC payments in a timely manner. The Commission agrees with New England Power that the ambiguous tariff provision was taken out of context and that Section J should apply to any amounts that Norwood failed to pay when due.

50. The Commission finds that New England Power is correct that Section N of Schedule I of its tariff addresses only the interest or carrying charges applicable to Norwood's payment of the CTC over a period of time.[72] It does not address charges for late payment of the monthly obligation, which is subject to Section J of the tariff.[73]

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[70] New England Power cites *Town of Norwood, Massachusetts v. National Grid* USA, 107 FERC ¶ 63,041 at P 109 (2004).

[71] *Town of Norwood, Massachusetts v. National Grid USA*, 112 FERC ¶ 61,099 at P 81 (2005).

[72] See supra note 64.

[73] See supra note 65.

51. The Commission disagrees with New England Power that the issue of interest was not set for hearing. Interest is an integral component of the CTC calculation, and all components of the CTC formula were set for hearing to determine whether New England Power's calculation was consistent with the accepted CTC formula.[74] The Commission recognizes that the amount of the CTC was in dispute; however, tariff section J states that, if the amount is disputed, the 18-percent interest rate will apply to "the amount finally determined to be due and payable."

B. Compliance Filing

52. On August 3, 2005, New England Power submitted its compliance filing as directed by the July 22, 2005 Order. In the compliance filing, New England Power states that the monthly CTC payment owed by Norwood is $599,971, plus applicable interest. Norwood filed objections to the compliance report, contending that New England Power incorrectly determined the applicable interest, overstating it by $6.1 million.

53. Because the Commission is granting New England Power's request for rehearing as discussed above, the Commission will reject New England Power's compliance filing that calculates Norwood's monthly CTC obligation and interest in accordance with the July 22, 2005 Order. The Commission has recalculated the principal and late payment interest. The Commission calculates that Norwood owes New England Power $68,749,414 through December 31, 2005, including $33,309,106 of late payment interest. In addition, Norwood owes New England Power $20.4 million of CTC payments for the years 2006 through 2008, plus 18 percent

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[74] *See Town of Norwood, Massachusetts v. National Grid USA*, 107 FERC ¶ 63,041 at P 9 (2004).

interest on any payments that are not made in a timely manner.[75]

The Commission orders:

(A) As discussed in the body of this order, the Commission denies Norwood's request for rehearing and grants New England Power's request for rehearing.

(B) As discussed in the body of this order, the Commission rejects New England Power's compliance filing in Docket No. EL03-37-002.

By the Commission.

(SEAL)

Magalie R. Salas,
Secretary.

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[75] See Attachment A

July 22, 2004	-$20,356,994	Payment
July 31, 2004	25,240,802	
Aug-04	25,840,773	378,612
Sep-04	26,440,744	387,612
Oct-04	27,040,715	396,611
Nov-04	27,640,686	405,611
Dec-04	28,240,657	414,610
Total 2004		$6,518,837

Docket Nos. EL03-37-002 and EL03-37-003

Total 1998-2005	35,440,309	**33,309,106**	**68,749,414**
2006	$7,199,652		
2007	$7,199,652		
2008	$5,999,710		
Total 2006-2008	$20,399,014		

Feb-04	42,597,941	629,970
Mar-04	43,197,912	638,969
Apr-04	43,797,883	647,969
May-04	44,397,854	656,968
Jun-04	44,997,825	665,968
Jul-04	45,597,796	674,967

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION
115 FERC ¶ 61, 396

Docket Nos. EL03-37-004
EL03-37-000

Before Commissioners: Joseph T. Kelliher, Chairman; Nora Mead Brownell, and Suedeen G. Kelly.

TOWN OF NORWOOD, MASSACHUSETTS,

v.

NATIONAL GRID USA, NEW ENGLAND ELECTRIC SYSTEM, MASSACHUSETTS ELECTRIC COMPANY, and NARRAGANSETT ELECTRIC LIGHT COMPANY.

ORDER DENYING REHEARING AND REQUEST FOR STAY

(Issued June 30, 2006)

1. In this order, the Commission denies a request for rehearing of the Order on Rehearing and Compliance Filing issued on February 22, 2006 (February 22, 2006 Order).[1] On rehearing, the Town of Norwood, Massachusetts (Norwood) challenges the Commission's determination that the 18-percent late payment interest rate established in New England Power Company's (New England Power)[2] tariff applies to

[1] *Town of Norwood, Massachusetts v. National Grid USA*, 114 FERC ¶ 61,187 (2006).

[2] New England Power has been renamed National Grid USA Service Company, Inc. following the merger of its corporate parent. However, throughout this order, the company is referred to as New England Power.

late payments of the Contract Termination Charge (CTC). The CTC obligates Norwood to compensate New England Power for N000d's early termination of a full requirements electric service contract. As discussed below, the Commission affirms that New England Power's tariff Section J (Billings and Payment) governs the interest rate applicable to late CTC payments by Norwood.

2. Norwood also filed a motion for stay of the Commission's ruling that the 18-percent interest rate applies to late CTC payments. It contends that the February 22, 2006 Order requires payment of a sum so large that authorization from the town, as well as from the Commonwealth of Massachusetts, will be required for Norwood to seek long-term financing of the amount.[3] Norwood also asserts that it will suffer irreparable harm as a result of financing such a large amount. On April 5, 2006, the Commission issued a Notice of Extension of Time for compliance with the February 22, 2006 Order until further order of the Commission. As discussed below, the Commission also denies the request for a stay.

I. *Background*

3. Previous orders contain detailed descriptions of the background and history of the parties' contractual relationship, the CTC, and the lengthy procedural history of the dispute over the CTC.[4]

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[3] In the February 22, 2006 Order, the Commission determined that the amount of the CTC through December 31, 2005, including late payment interest at 18 percent per year, is $68,749,414, with an additional $20.4 million due for the years 2006-2008, plus interest at 18 percent per year applicable to any late payments. *Town of Norwood, Massachusetts v. National Grid USA*, 114 FERC ¶ 61,187 at P 53 (2006).

[4] *E.g., Town of Norwood, Massachusetts v. National Grid USA*, 107 FERC ¶ 63,041 (2004), *order on initial decision*, 112 FERC ¶ 61,099 (2005), *order on reh'g and compliance filing*, 114 FERC ¶ 61,187 (2006).

4. In brief, New England Power began providing wholesale full requirements electric service to Norwood in 1983. In 1989, the parties amended the contract to allow Norwood to extend the earliest date for giving notice of its intent to terminate the contract. Although Norwood extended the term of the contract through October 2008, it notified New England Power on March 4, 1998, that it intended to terminate the contract early—effective April 1, 1998—so that it could obtain electric power from another supplier.

5. Shortly after receiving the notice of termination, New England Power filed an amendment to its Tariff No. 1 that would allow customers to buy out their service agreements if they paid CTCs. New England Power acknowledged that this amendment applied only to Norwood. The Commission accepted the amendment.[5] Since that time, the parties have engaged in extensive administrative and judicial litigation concerning the interpretation and application of the CTC. The CTC is calculated under a formula designed to compensate New England Power for the difference between the revenues it would have received absent early termination of the contract and the estimated market value of the released capacity and energy.[6]

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[5] *England Power Co.*, 83 FERC ¶ 61,174, *order on reh'g*, 84 FERC ¶ 61,175 (1998), *aff'd, Town of Norwood v. FERC*, 202 F.3d 392 (1st Cir.), *cert. denied*, 531 U.S. 818 (2000).

[6] Norwood's CTC is determined by applying the following formula: CTC = (R-M) x L, where "R is New England Power's annual revenues from Norwood, "M is the estimated market value of Norwood's released capacity, and "L is the remaining length of the contract obligation, in this case, from April 1, 1998, through October 2008 in accordance with Norwood's decision to terminate its service from New England Power. The "R factor reflects the revenues that New England Power was receiving from Norwood at the time of the termination under Commission-approved rates. Such revenues reflect a credit for the transmission services that Norwood purchased from its transmission supplier. New England Power determined the revenues based on the revenue it received from

6. In the February 22, 2006 Order, the Commission determined that late CTC payments by Norwood are subject to the provision of New England Power's tariff that establishes interest on late payments at an effective rate of 18 percent per year (one and one-half percent per month).[7] While Norwood's request for rehearing purports to address only that determination, Norwood raises other issues relating to the CTC generally.

II. *Discussion*

A. *Request for Rehearing*

7. Norwood acknowledges that the February 22, 2006 Order contains final rulings on all issues except for the 18-percent interest rate, which Norwood claims was addressed by the Commission for the first time in that order. In fact, asserts Norwood, the CTC payments owed are not late because the Commission ruled for the first time on the appropriate CTC amount in its July 22, 2005 Order on Initial Decision.[8] However, Norwood's principal argument is that the tariff provision containing the 18-percent interest rate applies only to bills for wholesale power, not to CTC amounts. Addi-

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Norwood during the 12 months immediately prior to the early termination date. The "M factor used by New England Power is the market value of the power it was supplying Norwood at the time of the early termination. The CTC formula includes a table of kilowatt hour (kWh) prices to be used in this calculation for the years 1998 through 2007 and provides that prices for 2008 and thereafter will be the prices for 2007 escalated at two percent annually. The released load factor used by New England Power is the annual average of kWh that Norwood purchased from New England Power during the 12 months prior to the early termination. *Town of Norwood, Massachusetts v. National Grid USA*, 114 FERC ¶ 61,187 at P 6-8 (2006).

[7] *Town of Norwood, Massachusetts v. National Grid USA*, 114 FERC ¶ 61,187 at P 43-51 (2006).

[8] *Town of Norwood, Massachusetts v. National Grid USA*, 112 FERC ¶ 61,099 (2005).

tionally, Norwood argues that, even if a late payment charge is appropriate, the 18-percent rate is unrelated to any actual costs borne by New England Power and thus is not justified under the Federal Power Act (FPA).[9] New England Power filed an answer to the request for rehearing, and Norwood filed an answer to New England Power's answer.

8. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure[10] prohibits an answer to a request for rehearing unless otherwise ordered by the decisional authority. In this case, the Commission is not persuaded to accept the answers by New England Power and Norwood and, therefore, rejects them. New England Power and Norwood also filed responsive pleadings addressing Norwood's request for stay. The Commission likewise rejects those pleadings.

B. *Motion to Lodge*

9. On May 22, 2006, New England Power filed a motion to lodge a Memorandum and Order issued by the Commonwealth of Massachusetts Appeals Court (Appeals Court).[11] New England Power maintains that the Appeals Court's opinion is relevant to Norwood's request for rehearing and motion to stay and will permit a more complete record.

10. New England Power explains that the Appeals Court rejected Norwood's appeal from a lower court decision denying a motion for stay and relief from the judgment against Norwood for unpaid CTC charges and accrued interest. New England Power observes that the Appeals Court ruled that it already had affirmed the judgment from which Norwood sought relief.[12] Further, states New England Power,

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[9] 16 U.S.C. § 791a *et seq.* (2000).

[10] 18 C.F.R. § 385.213(a)(2) (2005).

[11] Case No. 05-P-284 (May 17, 2006).

[12] *England Power Co. v. Town of Norwood*, Case 01-P-1467, slip op. at 6 n.6 (Mass. App. Ct.), *further appellate review denied*, 799 N.E.2d 594 (Mass. 2003); *cert. denied*, 541 U.S. 1073 (2004).

because the Supreme Judicial Court of Massachusetts and the U.S. Supreme Court already had denied Norwood's application for further review of that judgment, the Appeals Court held that Norwood's arguments had been resolved elsewhere. Accordingly, states New England Power, the Appeals Court remanded the proceeding to the trial court to conform the judgment to the Commission's February 22, 2006 Order.

11. Norwood filed an answer to the motion to lodge. Norwood does not object to acceptance of the document into the record, but maintains that the document has little, if any, bearing on this proceeding.

12. The Commission grants New England Power's motion to lodge the Memorandum and Order of the Appeals Court. The Commission finds that this unpublished judicial opinion[13] is relevant to the Commission's determination in this order.

C. *Tariff Section Applicable to Interest on Late CTC Payments*

1. *Background and Norwood's Argument*

13. In the Initial Decision, the Presiding Administrative Law Judge (AU) found that the Appeals Court previously had ruled that the 18-percent rate established in section J of New England Power's tariff applies to late CTC payments. Thus, the AU concluded that Norwood's attack on the interest rate was *res judicata* and outside the scope of this proceeding.[14]

14. On exceptions to the Initial Decision, the Commission ruled that late CTC payments are subject to interest calculated in accordance with section 35.19a of the Commission's

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[13] 66 Mass. App. Ct. 1108, 847 N.E. 2d 366, 2006 Mass. App. LEXIS 542 (2006).

[14] *Town of Norwood, Massachusetts v. National Grid USA*, 107 FERC ¶ 63,041 at P 109-110 (2004).

regulations.[15] However, in the February 22, 2006 Order, the Commission granted New England Power's request for rehearing and found that Tariff No. 1, Schedule I, page 7, section J (Billings and Payment) governs interest applicable to late CTC payments. That section provides in part as follows:

> When all or part of any bill shall remain unpaid for more than thirty (30) days after the rendering thereof by the Company, interest at the rate of 1 1/2% per month shall accrue to the Company from and after the rendering of said bill and be payable to the company on either (1) such unpaid amount or (2) in the event the amount of the bill is disputed, the amount finally determined to be due and payable.

15. Norwood contends that section J predates the 1998 CTC amendment[16] and was part of a wholesale power tariff that did not contemplate CTC charges. It argues that the "bills contemplated by section J are for power purchases, not for CTC charges. Instead, Norwood contends that the interest rate provision of tariff section 35.19a is part of the CTC formula and governs the calculation of interest on late CTC payments.

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[15] *Town of Norwood, Massachusetts v. National Grid USA*, 112 FERC ¶ 61,099 at P81-82 (2005). The CTC provision provides in part as follows:

> The Contract Termination Charge shall be payable in equal monthly installments of principal and interest, the first payment to be made within 30 days after the date of termination of service ("Early Termination Date), over the remaining term of the Customer's notice period (or such shorter term, or in a single payment, as agreed by the Company and the Customer). The Customer's payments shall include carrying charges on the unpaid amount of the Contract Termination Charge at the interest rate determined pursuant to section 35.19a of the Commission's regulations (18 C.F.R. 35.19a) effective on the Early Termination Date and compounded monthly.

[16] Section J has been in New England Power's tariff since the mid-1970s.

Moreover, continues Norwood, the April 11, 1983 power sales contract provides as follows: "In the event of any conflict between the provisions of this Contract and the provisions of [New England Power's] FERC tariff, the provisions of this Contract shall control. Norwood claims that this contract provision contradicts the Commission's apparent assumption that there is an ambiguity that allows the general interest provision of the tariff to override the specificity of the CTC amendment.

16. Norwood maintains that section J defines bills to which the charge applies as those "rendered during the first part of the next succeeding month and that a month refers "to the period between two meter readings each of which shall have been taken within two days of the end of successive calendar months. Thus Norwood argues that section J cannot apply to undetermined CTC charges, which are to recover "revenues lost from the termination of its agreement with New England Power. Norwood further argues that the calculation of the revenues lost could not have been determined before July 22, 2005, when the Commission issued the Order on Initial Decision in this proceeding. Moreover, continues Norwood, the Order on Initial Decision only required New England Power to make a compliance filing, so the amount actually owed was unknown until the February 22, 2006 Order on rehearing of the Order on Initial Decision. In fact, Norwood claims that there still has been no final determination of interest or review of the Commission's contested orders. Norwood reasons that the early "bills from New England Power were only statements for undetermined amounts, so Norwood could not have been late in payment for amounts that were not yet known.

17. Norwood cites *Town of Norwood v. FERC*,[17] contending that the court recognized that the Commission had not de-

[17] 202 F.3d 392, 400 (1st Cir. 2000).

termined any amount that was owed. Further, argues Norwood, when the Commission set this case for hearing, it reaffirmed that, although it had accepted the CTC formula, it had not accepted the individual components of the CTC calculation.[18] Norwood also asserts that the Commission did not accept New England Power's calculation of the CTC amounts.[19]

18. Norwood next claims that the 18-percent interest rate is not cost-based and thus is unjust and unreasonable. It points out that this rate is far above the section 35.19a refund interest rate and even above New England Power's long-term financing costs. Norwood contends that interest rates are compensation for the use of money, and to be reasonable, such rates must reflect the cost of capital.[20] Moreover, continues Norwood, even if the late payment charge could be justified in the context of the CTC, the imposition of such a charge in this case can serve no legitimate regulatory purpose because it is retroactive and cannot be a deterrent. Norwood submits that customers cannot be charged for costs that they do not cause[21] and also observes that the section 35.19a rate is the standard Commission rate that is applied to payment of overcharges and undercharges and that this rate automatically adjusts to changing money costs.

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[18] Norwood cites *Town of Norwood, Massachusetts v. National Grid USA*, 104 FERC ¶ 61,030 at P 18 (2003).

[19] Norwood cites *New England Power Co.*, 83 FERC ¶ 61,174 (1998).

[20] Norwood cites *Connecticut Light & Power Co.*, 59 FPC 811 (1977) (Commission rejected proposed 1.5-percent-per-month charge on bills unpaid beyond 28 days); *Public Service Company of New Mexico v. FERC*, 832 F.2d 1201 (10th Cir. 1987) (upholding Commission rejection of one-percent-per-month late charge for delinquent payment).

[21] Norwood cites *Sithe/Independence Power Partners, L.P. v. FERC*, 285 F.3d 1, 4 (D.C. Cir. 2002); *Ener, Inc. v. FERC*, 968 F.2d 1295, 1300 (D.C. Cir. 1992); *Farmers Union Cent. Exch., Inc. v. FERC*, 734 F.2d 1486 (1984).

19. Norwood next claims that the Commission may not apply a different interest rate to the CTC and to other payments, as it has done in this case. According to Norwood, in situations that involve streams of payments over time, the proper cost of capital compensation frequently involves interest increments or decrements depending on whether actual payments are ahead of or behind schedule. Norwood contends that the Commission previously has rejected disparities in these situations.[22]

20. Finally, Norwood argues that, even if section J applies to late CTC payments, the Commission should modify the interest rate. Norwood contends that the applicable interest rate is a component of the cost of the CTC, and the Commission set all components of the CTC formula for hearing. Norwood emphasizes that the Commission has an obligation to ensure that the rates charged are just and reasonable.

2. *Commission Analysis*

21. The Commission denies Norwood's request for rehearing. Norwood chose to terminate its service agreement with New England Power before the term expired. The Commission accepted the CTC amendment in 1998,[23] and the Federal courts upheld the Commission's determinations.[24] Numerous proceedings since that time have not afforded Norwood any relief from its CTC obligation, including the interest rate applicable to late CTC payments, and Norwood now improperly seeks to revisit issues already resolved by the Commission and the courts.

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[22] Norwood cites *Louisville Gas & Electric Co.*, 62 FERC ¶ 61,016 at 61,150 (1993).

[23] *England Power Co.*, 83 FERC 61,174, *reh'g denied*, 84 FERC ¶ 61,175 (1998).

[24] *Town of Norwood, Massachusetts v. FERC*, 202 F.3d 392 (1st Cir.), *cert. denied*, 531 U.S. 818 (2000).

22. The 1998 CTC amendment accepted by the Commission addressed only the amount of Norwood's monthly CTC payments or the possibility of making a lump-sum payment if the parties so agreed. Specifically, the CTC formula calculated the net present value of CTC by using an interest rate of eight percent (the section 35.19a discount rate effective on the Early Termination Date) to discount the difference between the Average Annual Revenue (R) and the Estimated Market Value (M) of the released capacity and energy over the length of the obligation (period between the Early Termination Period and the Regular Termination Date).[25] As initially determined by New England Power, the discounted lump sum amount under the CTC formula was to be $52,635,658 if Norwood chose to make a lump sum payment. In the alternative, and using the eight-percent interest rate, the CTC formula yielded a monthly payment due of $615,674 for 127 months or total CTC charges of $78,190,598 over the required notice period. This amount was trued-up to account for estimates that were used in the filing, and the monthly amount to be used in the billings was set at $599,971.[26] In its request for rehearing of the Order on Initial Decision, New England Power stated that it has billed Norwood this amount each month since April 1998.[27]

23. Similarly, the Appeals Court determined that the 18-percent late payment interest rate applied to late CTC payments by Norwood, and its ruling was not disturbed on

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[25] Amendment to Tariff filed March 18, 1998, Docket No. ER98-2233-000, Tariff No. 1, Schedule II-C, Original Page Nos. 1 through 5.

[26] Norwood and New England Power do not dispute that use of the CTC formula produces this monthly payment. The issue here is what late payment interest rate should be applied to the monthly bills that Norwood failed to pay.

[27] *Town of Norwood, Massachusetts v. National Grid USA*, 114 FERC ¶ 61,187 at P 44 (2006) *(citing* Ex. NEP-1 at 36; Ex. NEP-2 at Schedule II-C at 2 § B; Ex. NEP-6).

appellate review, which included denial of certiorari by the U.S. Supreme Court.[28] Accordingly, Norwood knew in 2003 that the 18-percent rate would apply to CTC payments not made in a timely manner.

24. Norwood's other arguments are equally unavailing. As the Commission held in the February 22, 2006 Order, section J clearly addresses the interest that will accrue on billed amounts that remain unpaid for more than 30 days. Contrary to Norwood's assertion, there is no provision in the CTC formula that addresses the failure to pay billed amounts. The only interest provision in the CTC formula is that specified for use in the calculation of the net present value of the CTC and the monthly payments due if a lump sum payment is not made. Thus, the Commission affirms its earlier determination that the section J interest rate of 18 percent per year applies to the interest on the billed amounts of CTC charges that are not paid within 30 days of billing. It is not a valid defense to assert that Norwood did not know with certainty the ultimate liability for CTC charges and thus had no obligation to pay the billed amounts while challenging the interest rate. New England Power's tariff does not support such a claim. Indeed, section J expressly provides for the accrual of late charges on disputed bills. Therefore, late payment interest charges have been properly applied pursuant to section J.

25. Since the mid-1970s, section J has been part of New England Power's tariff on file with the Commission. Neither New England Power nor the Commission bears the burden of justifying the interest rate in this complaint proceeding. If Norwood seeks to demonstrate that the late payment interest rate is unjust and unreasonable, it bears the burden of proof under FPA section 206. It has failed to carry that burden in this proceeding.

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[28] *See New England Power Co. v. Town of Norwood*, Case 01-P-1467, slip op. at 6 n.6 (Mass. App. Ct.), *further appellate review denied*, 799 N.E.2d 594 (Mass. 2003); *cert. denied*, 541 U.S. 1073 (2004).

26. For example, it is not tenable for Norwood to assert that, because the interest rate in New England Power's tariff is higher than the refund rate determined under section 35.19a of the Commission's regulations, it is unjust and unreasonable. If that were the case, it would suggest that all such interest rates in jurisdictional utility tariffs are unreasonable if they do not correspond to those specified under section 35.19a. Late payment charges do not have to be based solely on the cost of money, as Norwood contends. A utility may also incur collection costs, including costs of litigation. Additionally, late payment charges may include an incentive for the debtor to make timely payments. Norwood has not addressed any of these factors or others that might have served as the basis for the Commission's acceptance of the rate in Section J. Further, Norwood has not shown any changed circumstances that would render the existing tariff interest rate unjust and unreasonable. The Commission affirms its holding in the February 22, 2006 Order that the late payment interest rate in New England Power's tariff section J applies to late CTC payments by Norwood.

27. Norwood also contends that no deterrent purpose can be served by the late payment charge; however, that is not the issue. Norwood became obligated to pay the CTC when the Commission accepted the CTC amendment to New England Power's tariff. The late payment interest accrues each time Norwood fails to make a required CTC payment in a timely manner. The Commission emphasizes that these charges have continued to accrue throughout the lengthy administrative and judicial proceedings related to the CTC. Norwood should not now be rewarded for its protracted effort to delay meeting its responsibilities. Accordingly, rehearing is denied.

D. *Motion for Stay*

1. *Norwood's Argument*

28. Norwood estimates that the financial effect on it of the February 22, 2006 Order is approximately $115 million, of which it has paid approximately $20 million. According to Norwood, this large amount will have to be financed, which under Massachusetts law requires two town meetings and special legislation by the Massachusetts legislature. Norwood anticipates that this process could take approximately a year. Thus, Norwood seeks a stay of the February 22, 2006 Order pending rehearing and appellate review. At a minimum, Norwood requests a stay pending the Commission's ruling on its request for rehearing. Norwood insists that it is likely that the Commission and the courts will modify the Commission's order on rehearing and appeal.

29. According to Norwood, to the extent that CTC charges paid by its residential customers may later be found unwarranted, subsequent refunds cannot make the consumers whole. Moreover, states Norwood, if it finances amounts that might later be found to be unjustified, that could affect its credit rating and its financing costs for other projects. On the other hand, Norwood argues that there will be virtually no harm to New England Power if the Commission grants the stay. Norwood points out that, if New England Power prevails in this case, it will receive full payment of the CTC, plus interest at the rate established in section 35.19a.

2. *Commission Analysis*

30. The Commission denies Norwood's request for a stay. First, the Commission already granted Norwood an extension of time pending rehearing. In its motion for stay, Norwood acknowledged this as an acceptable alternative to a stay pending any appellate review.[29]

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[29] Town of Norwood, Massachusetts Motion for Stay at 3, 17 (March 17, 2006).

31. The Commission will grant a stay when justice so requires.[30] However, the Commission generally denies motions for stays of its orders to assure finality in its proceedings.[31] An applicant for a stay must satisfy three tests: (1) the moving party will suffer irreparable injury without the stay; (2) the stay will not substantially harm other parties; and (3) the stay is in the public interest.[32]

32. Moreover, the Commission and the courts have established a strict standard for what is required to show irreparable harm:

> [T]he injury must be both certain and great; it must be actual and not theoretical. Injunctive relief "will not be granted against something merely feared as liable to occur at some indefinite time, ...
>
> It is also well settled that economic loss does not, in and of itself, constitute irreparable ham. . . . Mere injuries, however substantial, in terms of money, time and energy necessarily expended in the absence of a stay are not enough.[33]

33. The February 22, 2006 Order merely recalculated the principal and late payment interest owed by Norwood. A stay of that order cannot relieve Norwood of its obligation to pay the judgment of the Massachusetts court for CTCs due

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[30] 5 U.S.C. § 705 (2000).

[31] E.g., *CMS Midland, Inc.*, 56 FERC 61,177 at ¶ 61,631 (1991), *aff'd sub nom. Mich. Mun. Coop. Group v. FERC*, 990 F.2d 1377 (D.C. Cir.), *cert. denied*, 510 U.S. 990 (1993); *Eastern Shore Natural Gas*, 112 FERC ¶ 61,171 at P 8 (2005); *Arkansas Louisiana Gas Co.*, 23 FERC ¶ 61,324 at 61,714 (1983) ("the Commission follows a general policy of denying motions for stays of its orders).

[32] *Eastern Shore Natural Gas*, 112 FERC ¶ 61,171 at P 9 (2005).

[33] *Wisconsin Gas Co. v. FERC*, 758 F.2d 669, 674 (D.C. Cir. 1985) (citations omitted).

through January 2001 and associated late payment charges.[34] Further, the prospect of judicial review is not a sufficient basis for the Commission to grant a stay.

34. Norwood has failed to demonstrate that it will suffer irreparable harm absent a stay. The alleged harm cited by Norwood results in large part from Norwood's own actions in failing to pay the CTCs when due or to escrow adequate funds to meet its obligations. As stated above, Norwood had ample reason to know the amount of the CTCs and that the 18-percent late payment interest rate would be applied to late payments. The fact that Norwood hoped for relief from the courts or the Commission is an inadequate excuse for failing to prepare to pay its obligation to New England Power. Even now, Norwood has the ability to limit future sums due New England Power for the years 2006-2008 by paying the upcoming monthly CTCs pending any appeal that it may pursue. Norwood has failed to satisfy the high standard for seeking a stay.

35. While Norwood contends that New England Power would suffer no harm if a stay were granted and that the public interest would not be harmed by the grant of the stay, the Commission disagrees. New England Power already has been required to expend considerable sums to litigate the CTC, which the Commission approved in 1998, and Norwood indicates that it will continue to challenge the Commission's orders in this complaint proceeding, thereby requiring New England Power, the Commission, and the courts to commit resources in a continuing effort to resolve Norwood's claims. Thus the public interest also would not be served by granting Norwood's requested stay. Norwood has been afforded ample opportunity to challenge all aspects of the CTC, beginning when New England Power filed the CTC amendment in 1998.

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[34] *Town of Norwood, Massachusetts v. National Grid USA*, 104 FERC ¶ 61,030 at P 22 (2003).

36. The Commission always favors settlements in contested proceedings, and it particularly encourages Norwood and New England Power to develop a payment plan to resolve this proceeding. The Commission offers a variety of Alternative Dispute Resolution procedures to assist the parties if they so desire.

The Commission orders:

(A) The Commission denies Norwood's request for rehearing of the February 22, 2006 Order.

(B) Norwood's motion for a stay is denied, as discussed in the body of this order.

(C) Norwood must commence making CTC payments as billed and must act expeditiously to obtain necessary authorizations and funding to pay past due CTC payments plus interest in accordance with the findings and conclusions of this order.

By the Commission.

(SEAL)

Magalie R. Salas,
Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION
104 FERC ¶ 61,030

Docket No. EL03-37-000

Before Commissioners: Pat Wood, III, Chairman; William L. Massey, and Nora Mead Brownell.

TOWN OF NORWOOD, MASSACHUSETTS,

v.

NATIONAL GRID USA, NEW ENGLAND ELECTRIC SYSTEM, MASSACHUSETTS ELECTRIC COMPANY, and NARRAGANSETT ELECTRIC LIGHT COMPANY.

ORDER SETTING COMPLAINT FOR HEARING IN PART AND DISMISSING IT IN PART AND ESTABLISHING SETTLEMENT JUDGE PROCEDURES

(Issued July 2, 2003)

Summary

1. This order sets for hearing in part and dismisses in part a complaint that the Town of Norwood, Massachusetts (Norwood) filed against National Grid USA, *et al.* (National Grid) concerning a contract termination charge (CTC) that New England Power Company (NEPCO) seeks to collect from Norwood. This order benefits customers by ensuring that the CTC is calculated correctly.

Background

The Parties

2. Norwood is a municipality that owns and operates a municipal utility that distributes retail electric energy to

residents and businesses in the town. National Grid is an electric utility that sells, transmits and distributes electric energy. In 1998, National Grid acquired the New England Electric System and its subsidiaries.

3. New England Power Company (NEPCO) is a subsidiary of the New England Electric System, which also owns four retail distribution companies, including Massachusetts Electric Company, (Mass Electric) serving Massachusetts, and Narragansett Electric Company (Narragansett), serving Rhode Island. NEPCO sells wholesale electric energy that it generates or buys from others to both affiliates, such as Mass Electric and Narragansett, and to other wholesale customers (with which it is not affiliated), such as Norwood.

The CTC

4. The CTC arose out of a series of transactions in which NEPCO restructured itself to accommodate customer choice and market-based pricing in New England at both the wholesale and retail levels.[1] A knowledge of this history is essential to understanding the parties' arguments regarding the CTC.

5. For many years NEPCO provided wholesale requirements service under its Tariff No. 1 to its retail distribution affiliates, Mass Electric and Narragansett. In 1983, the Commission accepted a service agreement under Tariff No. 1 for full requirements service between NEPCO and Norwood, which placed Norwood on a comparable basis with Mass Electric in Massachusetts and Narragansett in Rhode Island.[2]

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[1] *See Town of Norwood v. FERC*, 202 F.3d 392, 396-97 (1st Cir. 2000), *cert. denied*, 531 U.S. 818 (Norwood I); *Town of Norwood v. FERC*, 212 F.3d 24, 26 (1st Cir. 2000), *cert. denied*, 532 U.S. 993 (2000) (Norwood III); Answer to Complaint at 7.

[2] *See* New England Power Company, 83 FERC 61,174 at 61723-24, *reh'g denied*, 84 FERC 61,175 (1998); *aff'd Norwood I*. The service agreement resolved an antitrust case that Norwood brought against Boston

Although under Tariff No. 1 Norwood received its electric energy from NEPCO, it received its transmission services from Boston Edison.

6. The service agreement between NEPCO and Norwood under Tariff No. 1 obligated NEPCO to supply full requirements electric service to Norwood under the tariff, "as [it] may be amended from time to time."[3] Norwood's service agreement was for an initial term of fifteen years, terminating on October 31, 1998, with a requirement for seven years' prior notice to effect a termination. In 1989, the parties amended their contract to permit Norwood at its election to extend the earliest date on which either party could give notice of termination from November 1, 1991 to November 1, 2001.

7. On July 25, 1990, Norwood sent a letter to New England Power stating that it "hereby gives notice . . . that it extends the date" for giving notice of termination of the service agreement from November 1, 1991, to November 1, 2001.[4] Norwood further stated that "the effect of this [letter] is that the Power Contract between [NEPCO] and Norwood would be extended for [ten] years to midnight, October 31, 2008."[5]

8. In December 1996, NEPCO made several filings with the Commission to: (a) restructure itself; (b) revise its wholesale power sales tariff; (c) sell its non-nuclear generating facilities; (d) release its affiliates from their long-term requirements contracts with NEPCO (on payment of termination charges); and, (d) in general, revise its rates so as to facilitate customer

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Edison Company (Boston Edison) (from whom Norwood had been purchasing electric energy) and NEPCO. *See Town of Norwood v. New England Power Company*, 202 F.3d 408, 412 (1st Cir. 2000) (*Norwood II*).

[3] *See Town of Norwood v. FERC*, 217 F.3d 24, 25 (2000) (*Norwood IV*).

[4] *Norwood IV*, 217 F.3d at 25-26.

[5] *Id.* at 26.

choice and market-based pricing, in accordance with the directives of the public utility commissions in its service areas.[6]

9. As part of this restructuring, NEPCO proposed to temporarily sell wholesale electric energy at non-cost-based rates under an offering called the "standard offer of service." The rates under this offer began at 3.2 cents per kilowatt hour in 1998 and increase to 5.1 cents per kilowatt hour in 2004. NEPCO made this offer to those retailers that the state public utility commissions had required to offer retail standard offer rates to their own customers.[7] Such retailers included NEPCO's affiliates, Mass Electric and Narragansett, but did not include Norwood, which has no obligation to allow competitive access to its customers.[8] Over Norwood's objections, the Commission approved: (a) NEPCO's restructured rates, as well as a freeze on the rates that NEPCO charged wholesale customers such as Norwood;[9] and (b) the divestiture of NEPCO's non-nuclear generation.[10] The Court of Appeals for the First Circuit upheld the Commission's orders.[11]

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[6] *See Norwood I*, 202 F.3d at 396-97; *Norwood IV*, 217 F.3d at 25-26.

[7] The states were introducing competition at the retail level and wanted retail purchasers to have an initial low-rate offering as a backup while competitive sources of supply developed. *See Norwood II*, 202 F.3d at 413.

[8] *Id.*

[9] *See* New England Power Company, 78 FERC ¶ 61,080 (1997); New England Power Company, 81 FERC ¶ 61,281 (1997), *reh'g denied*, 83 FERC ¶ 61,265 (1998); *reh'g denied*, 84 FERC ¶ 61,175 (1998); New England Power Company, 82 FERC ¶ 61,179 (1998), *reh'g denied*, 83 FERC ¶ 61,275 (1998).

[10] New England Power Company, Narragansett Electric Company, All-Energy Marketing Company, L.L.C., and USGen New England, Inc., 82 FERC ¶ 61,179, *order on clarification and reh'g*, 83 FERC ¶ 61,275 (1998).

[11] *Norwood I*, 202 F.3d at 398-405.

10. On March 4, 1998, Norwood notified NEPCO that it was terminating service under its service agreement with NEPCO, effective April 1, 1998, and would, on that date, begin taking service from Northeast Utilities Service Company. On March 18, 1998, NEPCO filed an amendment to FERC Tariff No. 1, permitting customers such as Norwood to terminate their contracts early, on only thirty days' notice (compared to seven years' notice), conditioned on the customers paying a contract termination charge (the CTC that is the subject of Norwood's complaint).[12] The CTC was based on an avoided cost concept[13] that is similar to the lost revenues approach that the Commission approved in Order No. 888.[14] Norwood

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[12] NEPCO offered its Tariff No. 1 customers an open season in which to terminate their service under the tariff. NEPCO stated that the proposed amendment would afford Norwood the ability, which it otherwise did not have, to terminate its service under the tariff on April 1, 1998, conditioned on its paying the CTC. NEPCO emphasized that it stood ready to negotiate termination agreements with its wholesale requirements customers on mutually agreeable terms. *See* New England Power Company, 83 FERC ¶ 61,174 (1998); New England Power Company, 83 FERC ¶ 61,265 (1998); *reh'g denied* 84 FERC ¶ 61,175 (1998).

[13] NEPCO calculates the CTC based on the difference between the revenues that NEPCO would have received had the customer continued to take service for the applicable notice period (reduced by the portion of those revenues attributable to transmission costs) and the estimated market value of the power the customer would have received in that circumstance, Norwood estimates that the CTC will exceed seven million dollars per year until 2008. *See* New England Power Company, 83 FERC ¶ 61,174, *reh'g denied*, 84 FERC ¶ 61,175 (1998).

[14] Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs., Regulations Preambles, January 1991-June 1996 31,036 (1996), *order on reh'g*, Order No. 888-A, 62 Fed. Reg., 12,274 (March 4, 1997), FERC Stats. & Regs., Regulations Preambles, July 1996-December 2001 ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *affd*

has terminated its contract with NEPCO but has not paid the CTC.

11. Norwood brought a breach of contract and antitrust action against NEPCO and others in the U.S. District Court for the District of Massachusetts, alleging that NEPCO had breached the 1983 power purchase contract and that the CTC resulted in anticompetitive effects. The District Court dismissed the action.[15] The court of appeals affirmed the District Court's order, except that it remanded one antitrust claim to the District Court for further proceedings.[16]

12. Norwood also sought a declaratory order from the Commission that its July 25, 1990 letter did not extend the term of its contract with NEPCO to October 31, 2008 (the contract expiration date that NEPCO uses in its calculation of the CTC). The Commission denied Norwood's petition.[17] The court of appeals upheld the Commission's decision, expressly finding that the 1990 letter extended the contract, and thus extended Norwood's obligation to purchase electric energy from NEPCO to October 31, 2008.[18]

The Complaint

13. On December 23, 2002, Norwood filed a complaint against National Grid, *et al.*, attacking the CTC as unjust and unreasonable and unduly discriminatory and preferential or

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in relevant part sub nom. Transmission Access Policy Study Group, et al., v. FERC, 225 F. 3d 667 (D.C. Cir. 2000), *affd sub nom. New York v. FERC*, 122 S. Ct. 1012 (2002).

[15] Town of Norwood, Mass. v. New England Power Company, 23 F. Supp. 2d 109 (D. Mass. 1999).

[16] *Norwood II*, 202 F. 2d at 414-424.

[17] *Town of Norwood, Mass.*, 87 FERC ¶ 61,341 (1999), *reh'g denied*, 88 FERC ¶ 61,187 (1999).

[18] *Norwood IV*, 217 F.3d at 27-30.

otherwise unlawful under the Federal Power Act (FPA). In support of its complaint, Norwood makes the following claims:

(A) NEPCO charges a CTC to Norwood that is higher than the CTC that it charges to its affiliated distribution systems and thus is unduly discriminatory and preferential and places Norwood in an unlawful price squeeze, in violation of sections 205 and 206 of the FPA.

(B) NEPCO bases the CTC that it charges Norwood on an erroneous calculation of the estimated market value of the load that NEPCO would have had to supply absent early termination of the contract ("the customer's released load").

(C) The revenue factor that NEPCO relies on to calculate the CTC is incorrect.

(D) The rate of return that NEPCO uses in the CTC calculation is excessive.

(E) NEPCO's deduction for transmission revenues misapplies the Order No. 888 formula and results in an overcharge to Norwood.

(F) NEPCO has understated its fixed power supply costs relating to Norwood, resulting in a CTC that is unjust and unreasonable.

(G) NEPCO's use of October 31, 2008 as the earliest date on which Norwood could have unilaterally terminated the contract is incorrect and results in a CTC that is unreasonably high.

(H) The CTC in conjunction with the rates that Norwood pays Northeast Utilities results in discriminatory and unduly preferential rates in violation of Sections 205 and 206 of the FPA.

(I) NEPCO's denial of standard offer wholesale service ("the standards offer of service," discussed above) to Norwood, while offering it to NEPCO's affiliates, was discriminatory and preferential, in violation of Sections 205 and 206 of the FPA.

(J) NEPCO's charging Norwood a CTC, while not imposing the same charge on its affiliates, constitutes undue discrimination and preferential treatment, in violation of Sections 205 and 206 of the FPA.

(K) NEPCO's failure to offer an open season without a CTC charge as part of its divestiture of non-nuclear generation results in a CTC charge that is not a just and reasonable condition for termination of service.

(L) The CTC violates 18 C.F.R. § 35.26 (2003), which precludes stranded cost recovery in new contracts that do not contain an exit fee or explicit stranded cost provision.

(M) The CTC is unlawful because NEPCO did not provide Norwood with an opportunity to market or broker the capacity that Norwood released when it terminated its contract with NEPCO.

The Answer

14. On January 1, 2003, National Grid filed an answer and motion to dismiss. National Grid claims that Norwood's obligation to pay the CTC is beyond doubt. It also asserts that the Commission and the courts have already decided all of the issues that Norwood raises in its complaint. It asks the Commission to summarily dismiss all of Norwood's claims. In the alternative, it asks the Commission to either: (a) insist that Norwood pay the full amount of its current obligation under the CTC into escrow before it can raise its claims; or (b) refer the matter to a settlement judge for prompt resolution. Finally, National Grid argues that Norwood has failed

to state a claim against National Grid, New England Electric System, Massachusetts Electric or Narragansett.

Norwood's Reply

15. On February 24, 2003, Norwood filed an answer to the National Grid's answer, largely repeating the arguments in its complaint.

Discussion

A. Procedural Matter

16. Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213(a)(2) (2002), prohibits an answer to an answer, unless otherwise permitted by the decisional authority. We are not persuaded to allow Complainant's answer and will, therefore, reject it.

B. The Motion to Dismiss

17. National Grid asks that we dismiss the complaint as to National Grid, New England Electric System, Massachusetts Electric and Narragansett. We find that the motion is premature. NEPCO, New England Electric System, Massachusetts Electric and Narragansett are all affiliates of National Grid and the complaint raises claims against all of these entities. It would be premature to dismiss these entities from the complaint proceeding without further examination of their respective functions and interrelationships and their connection (or not) with the CTC. To eliminate any of these entities at this juncture would potentially unnecessarily restrict the relief that the Commission may, if necessary, be able to fashion.

C. The CTC

18. Claims (B) to (F) of Norwood's complaint relate to the way in which NEPCO calculates the CTC. The Commission has approved the use of a CTC for the early termination of a contract and has accepted NEPCO's CTC formula, but has

not accepted the individual components of the CTC calculation.[19] While the court of appeals upheld the Commission's orders, it noted that Norwood could bring a complaint regarding the way in which NEPCO has calculated the CTC.[20] As the Commission has not approved the individual components used in NEPCO's calculation of Norwood's CTC, the Commission will set these claims (B through F) for hearing. Norwood will, of course, have the burden of proof on each and every element of these claims.

19. National Grid is correct that the Commission and the courts have conclusively adjudicated all of the other claims that Norwood raises in its complaint. For example, claims (A), (H), (I) and (J) charge that the standard offer rates either alone or in combination with the CTC result in rates that are unduly discriminatory and preferential and place Norwood in an unlawful price squeeze, in violation of sections 205 and 206 of the FPA. The court of appeals has held that "the mere disparity in Norwood's contract termination charge *vis-a-vis* that of other companies is not a per se violation of the undue preference prohibition."[21] It has also found that Norwood was not similarly situated to NEPCO's affiliates because Norwood did not have an obligation under state law to provide standard offer service to its customers, and that this difference

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[19] In accepting the CTC, the Commission found, among other things, that the proposed formula for calculating the CTC would recover the revenues lost over the existing seven-year notice of the termination term, less an estimate of the market value of the released capacity and energy, and that Norwood would avoid payment of the full demand charges over the remainder of the contract term. *See* New England Power Company, 83 FERC 61, 174 at ¶ 61,723; *reh'g denied*, 84 FERC ¶ 61,175 at 61,919 (1998).

[20] *See* New England Power Company, 83 FERC ¶ 61,174 at 61,7121-24 (1998), *aff'd Norwood I*, 202 F. 2d at 401.

[21] *Norwood I*, 202 F.3d at 402. NEPCO offered to negotiate a similar termination agreement with Norwood. New England Power Company, 83 FERC ¶ 61,174, n.13 (1998). Norwood did not accept the offer.

justifies the different treatment.[22] The Commission will not, therefore, set these claims for hearing.

20. Claim (G) relates to the earliest date on which Norwood could have unilaterally canceled its contract with NEPCO. Both the Commission and the court of appeals have held that Norwood's June 25, 1990 letter to NEPCO extended its contract to purchase electric energy from NEPCO until October 31, 2008, the date that NEPCO uses in calculating the CTC.[23] Accordingly, the Commission will not set this claim for hearing.

21. Claims K, L and M relate to: (a) NEPCO's failure to offer an open season without a CTC in which to terminate the requirements contract; (b) the possibility that the CTC violates the prohibition against recovery of stranded costs in new contracts that do not contain exit fees or explicit stranded cost provisions; and (c) the absence of an opportunity for Norwood to market or broker the capacity that it released when it terminated its contract with NEPCO. Both the Commission and the court of appeals have found that: (a) the imposition of a CTC when a customer terminates a contract before its expiration date is reasonable;[24] (b) the rules relating to stranded cost recovery do not apply to a charge for premature termination of a contract;[25] and (c) the rules allowing customers to market or broker released capacity do

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[22] *Id.* at 402-023.

[23] *See* Town of Norwood, 87 FERC ¶ 61,341 (1999), *aff'd Norwood IV*. *See also* New England Power Company, 83 FERC ¶ 61,174 at 61,722 & n. 7.

[24] *See* New England Power Company, 83 FERC ¶ 61,174 at 61723-24, *reh'g denied*, 84 FERC ¶ 61,175 (1998); *Norwood I*, 202 F3d at 400. The Massachusetts Superior Court found that the CTC is "akin to a *quid pro quo* for terminating the contract early." *New England Power Company v. Town of Norwood*, 2000 WL 292974 at 10.

[25] New England Power Company, 83 FERC ¶ 61,174 at 61,273; *reh'g denied* 84 FERC ¶ 61,175 (1998); *Norwood I*, 202 F3d at 398-399.

not apply to premature contract termination.[26] Consequently, the Commission will not set these claims for hearing.

D. Hearing and Settlement Judge Procedures

1. Hearing Procedures

22. In cases where, as here, the Commission institutes an investigation on complaint under Section 206 of the Federal Power Act, Section 206(b) requires that the Commission establish a refund effective date that is no earlier than 60 days after the filing of the complaint, but no later than five months subsequent to the expiration of the 60-day period. Consistent with our general policy of providing maximum protection to customers,[27] we will set the refund effective date as of the date 60 days after the date of the filing of the complaint, or February 21, 2003.

23. Section 206(b) also requires that, if no final decision is rendered by the refund effective date or by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to Section 206, whichever is earlier, the Commission shall state the reasons why it has failed to do so and shall state the best estimate as to when it reasonably expects to make such a decision. Ordinarily, to implement that requirement, we would direct the presiding judge to provide a report to the Commission in advance of the refund effective date. Here, given that the refund effective date for the complaint has passed, the Commission cannot follow its normal procedure.

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[26] *Norwood I*, 202 F.2d at 399 (Commission may allow the recovery of foregone revenues "whenever a customer purports to disregard an existing obligation").

[27] *See, e.g., Seminole Electric Cooperative, Inc. v. Florida Power & Light Company*, 65 FERC ¶ 61,413 at 63,139 (1993); Canal Electric Company, 46 FERC ¶ 61,153 at 61,539, *reh'g denied*, 47 FERC ¶ 61,275 (1989).

24. Although we do not have the benefit of the presiding judge's report, based on our review of the record, we expect that, assuming the case does not settle, the presiding judge should be able to render a decision within eight months of the commencement of hearing procedures. After the presiding judge renders an initial decision, assuming the case does not settle, we estimate that we will be able to issue our decision within approximately five months of the filing of briefs on and opposing exceptions.

2. *Settlement Judge Procedures*

25. While we are setting this proceeding for a trial-type, evidentiary hearing, we encourage the parties, before hearing procedures are commenced, to first make every effort to settle their dispute. To aid the parties in their settlement efforts, the hearing we have ordered shall be held in abeyance and a settlement judge shall be appointed to assist the parties in reaching a settlement.[28] If the parties desire, they may, by mutual agreement, request a specific judge as the settlement judge in this proceeding; otherwise the Chief Judge will select a judge.[29]

The Commission orders:

(A) The motion to dismiss is hereby granted in part and denied in part, as discussed in the body of this order.

(B) Pursuant to the authority contained in and subject to the jurisdiction conferred upon the Federal Energy Regulatory Commission by Section 402(a) of the Depart-

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[28] 18 C.F.R. § 385.603 (2003).

[29] If the parties decide to request a specific judge, they must make their joint request to the Chief Judge by telephone at (202) 502-8500 within five days of this order. FERC's website contains a listing of Commission judges and a summary of their backgrounds and experience (www.ferc.fed.us—click on the Office of Administrative Law Judges).

ment of Energy Organization Act and the Federal Power Act, particularly Section 206 thereof, and pursuant to the Commission's Rules of Practice and Procedure and the regulations under the Federal Power Act (18 C.F.R. Chapter 1), a public hearing shall be held in Docket Nos. EL03-37-000 into the justness and reasonableness of the calculation of the CTC, as discussed in the body of this order.

(C) Pursuant to Rule 603 of the Commission's Rules of Practice and procedure, 18 C.F.R. § 385.603 (2001), the Chief Administrative Law Judge is hereby directed to appoint a settlement judge in this proceeding within fifteen (15) days of the date of this order. To the extent consistent with this order, the designated settlement judge shall have all powers and duties enumerated in Rule 603 and shall convene a settlement conference as soon as practicable.

(D) Within sixty (60) days of the date of this order, the settlement judge shall file a report with the Chief Judge and with the Commission on the status of the settlement discussions. Based on this report, the Chief Judge shall provide the parties with additional time to continue their settlement discussions, if appropriate, or assign this case to a presiding judge for a trial-type evidentiary hearing, if appropriate. If settlement discussions continue, the settlement judge shall file a report at least every 30 days thereafter, informing the Chief Judge and the Commission of the parties' progress toward settlement.

(E) If settlement discussions fail, a presiding administrative law judge, to be designated by the Chief Administrative Law Judge, shall convene a prehearing conference in this proceeding, to be held within approximately fifteen days of the settlement judge's report to the Commission, in a hearing room of the Federal

Energy Regulatory Commission, 888 First Street, N.E. Washington, D.C. 20426. Such conference shall be held for the purpose of establishing a procedural schedule. The presiding administrative law judge is authorized to establish procedural dates, and to rule on all motions (except motions to dismiss) as provided in the Commission's Rules of Practice and Procedure.

(F) The refund effective date in Docket No. EL03-37-000 established pursuant to Section 206(b) of the Federal Power Act is February 21, 2003.

By the Commission.

(SEAL)

Linda Mitry,
Acting Secretary.

UNITED STATES OF AMERICA
FEDERAL ENERGY REGULATORY COMMISSION
107 FERC ¶ 63,041

Docket No. EL03-37-001

TOWN OF NORWOOD, MASSACHUSETTS,

v.

NATIONAL GRID USA, NEW ENGLAND ELECTRIC SYSTEM,
Massachusetts Electric Company, and
Narragansett Electric Light Company.

INITIAL DECISION
(Issued June 9, 2004)

APPEARANCES

Charles F. Wheatley, Jr., Esq., on behalf of the Town of Norwood.

Kenneth G. Jaffe, Esq., Lynn M. Gallagher, Esq., on behalf of the New England Power Company, National Grid USA, the New England Electric System, the Massachusetts Electric Company, and The Narragansett Electric Company.

William W. Bennett, Esq., Kevin C. Frank, Esq., on behalf of the Federal Energy Regulatory Commission Trial Staff.

BOBBIE J. McCARTNEY, Presiding Administrative Law Judge

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PROCEDURAL HISTORY[1]

1. For many years New England Power Company ("NEP") provided wholesale requirements service under its Tariff No. 1 to its retail distribution affiliates, Massachusetts Electric ("Mass Electric") and The Narragansett Electric Company ("Narragansett"). In 1983, the Commission accepted a Power Contract under Tariff No. 1 for full requirements service between NEP and Norwood, which placed Norwood on a comparable basis with Mass Electric in Massachusetts and Narragansett in Rhode Island. Although under Tariff No. 1 Norwood received its electric energy from NEP, it received its transmission services from Boston Edison Company ("BECO").

2. The Power Contract between NEP and Norwood under Tariff No.1 obligated NEP to supply full requirements electric service to Norwood under the Tariff, "as [it] may be amended from time to time."[2] Norwood's Power Contract was for an initial term of fifteen years, terminating on October 31, 1998, with a requirement for seven years' prior notice to effect a termination. In 1989, the parties jointly amended their contract to permit Norwood, at its election, to extend the earliest date on which either party could give notice of termination from November 1, 1991 to November 1, 2001.

3. On July 25, 1990, Norwood sent a letter to NEP stating that it "hereby gives notice . . . that it extends the date" for

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[1] The Procedural History ("procedural history") has been collaboratively submitted by the Parties and Commission Trial Staff in accordance with the procedures established by the undersigned Presiding Judge in this case. Any changes by the undersigned Presiding Judge are for consistency with the remainder of the Initial Decision. The procedural history remains substantively unmodified from the form in which the parties submitted it.

[2] *See Town of Norwood v. FERC*, 217 F.3d 24, 25 (1st Cir. 2000), *cert. denied*, 532 U.S. 993 (2001).

giving notice of termination of the service agreement from November 1, 1991, to November 1, 2001.[3] Norwood further stated that "the effect of this [letter] is that the Power Contract between [NEP] and Norwood would be extended for [ten] years to midnight, October 31, 2008."[4]

4. In December 1996 and October 1997, NEP made several filings with the Commission to: (a) allow restructuring of operations; (b) revise its wholesale power sales Tariff; (c) sell its non-nuclear generating facilities; (d) release its affiliates from their long-term requirements contracts with NEP (on payment of termination charges); and (e) in general, revise its rates so as to facilitate customer choice and market-based pricing, in accordance with the directives of the public utility commissions in its service areas.[5]

5. As part of this restructuring, NEP proposed to temporarily sell wholesale electric energy at non-cost-based rates under an offering called the "standard offer of service." NEP made this offer to those retailers which the state public utility commissions had required to offer retail standard offer rates to their own customers. Such retailers included NEP's affiliates, Mass Electric and Narragansett, but did not include Norwood, which has no obligation to allow competitive access to its customers. Over Norwood's objections, the Commission on February 25, 1998 approved: (a) NEP's restructured rates, as well as a freeze on the rates that NEP charged wholesale customers such as Norwood; and (b) the divestiture of NEP's non-nuclear generation. The U.S. Court of Appeals for the First Circuit upheld the Commission's orders.[6]

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[3] *Town of Norwood v. FERC*, 217 F.3d at 25-26.

[4] *See id.* at 26.

[5] *See Town of Norwood v. FERC*, 202 F.3d 392, 396-97 (1st Cir. 2000), *cert. denied*, 531 U.S. 818 (2000); *Town of Norwood v. FERC*, 217 F.3d at 25-26.

[6] *Town of Norwood v. FERC*, 202 F.3d 392.

6. On March 4, 1998, Norwood notified NEP that it was terminating service under its service agreement with NEP, effective April 1, 1998, and would, on that date, begin taking service from Northeast Utilities Service Company (NU").[7] On March 18, 1998, NEP filed an amendment to its FERC Tariff No. 1, permitting customers such as Norwood to terminate their contracts early, on only thirty days' notice (compared to seven years' notice), conditioned on the customers paying a contract termination charge ("CTC"). NEP stated that this proposed amendment offered Norwood the opportunity, previously unavailable, for Norwood to terminate service under the Tariff effective April 1, 1998. The CTC was based on an avoided cost concept that is similar to the lost-revenues approach that the Commission approved in Order No. 888.[8] Norwood terminated its contract with NEP effective April 1, 1998, but it has never paid any portion of the CTC. Over the objections of Norwood, in an order dated May 15, 1998, the Commission "accepted for filing, without suspension or hearing" NEP's March 18, 1998, amendment to their FERC Tariff No. 1.[9] On May, 28, 1998, Norwood wrote to NEP

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[7] Ex. NOR-5. On April 22, 1998, the Commission accepted the Norwood-NU contract. *See* "Letter Order," Docket No. ER98-2301-000 (issued April 22, 1998) (accepting NU Operating Companies' Rate Schedule 348 *et al.*).

[8] Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs., Regulations Preambles, January 1991-June 1996 ¶ 31,036 (1996), *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12,274 (March 4, 1997), FERC Stats. & Regs., Regulations Preambles, July 1996-December 2001 ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B, 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998), *aff'd in relevant part sub nom., Transmission Access Policy Study Group, et al., v. FERC*, 225 F. 3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 122 S. Ct. 1012 (2002).

[9] New England Power Co., 83 FERC ¶ 61,174 (1998).

advising that it did not accept its CTC.[10] On June 12, 1998, NEP responded to Norwood that, having terminated the purchase of power from NEP, Norwood was required to pay the CTC that was part of NEP's Tariff.[11] On August 5, 1998, the Commission denied Norwood's request for rehearing of the May 15, 1998 order.[12]

7. Norwood also sought a declaratory order from the Commission that its July 25, 1990 letter did not extend the term of its contract with NEP to October 31, 2008 (the contract expiration date that NEP uses in its calculation of the CTC). The Commission denied Norwood's petition.[13] The U.S. Court of Appeals for the First Circuit upheld the Commission's decision, expressly finding that the 1990 letter exercised the option in writing and extended the contract, and thus extended Norwood's obligation to purchase electric energy from NEP to October 31, 2008.[14]

8. On December 23, 2002, Norwood filed a complaint with the Commission against National Grid,[15] *et al*, attacking the CTC as unjust and unreasonable, unduly discriminatory, and preferential or otherwise unlawful under the Federal Power Act.[16] On January 1, 2003, National Grid filed an answer and motion to dismiss.[17]

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[10] Ex. NOR-7.

[11] Ex. NEP-9.

[12] New England Power Co., 84 FERC 61,175 (1998).

[13] Town of Norwood, 87 FERC 61,341 (1999), *reh'g denied*, 88 FERC 61,187 (1999).

[14] *Town of Norwood v. FERC*, 217 F.3d 24, 27-30 (1st Cir. 2000).

[15] National Grid Group plc acquired New England Electric System ("NEES"), the parent company of the New England Power Company ("NEP"), in 2000, and NEP was then renamed National Grid USA Service Company, Inc. *See* Ex. NEP-1 at 2:5 – 9.

[16] "Complaint of Town of Norwood, Massachusetts, Against National Grid USA For Imposing Unjust And Unreasonable Charges," Docket No. EL03-37-000 (filed on Dec. 23, 2002).

[17] "Answer to Complaint and Motion to Dismiss," Docket No. EL03-37-000 (filed on Jan. 30, 2003).

9. On July 2, 2003, the Commission "granted in part and denied in part" National Grid's motion to dismiss and set for hearing certain of Norwood's claims about the components of the CTC calculation.[18] In the July 2 Order, the Commission stated that it had already found that:

> (a) the imposition of a CTC when a customer terminates a contract before its expiration date is reasonable; (b) the rules relating to stranded cost recovery do not apply to a charge for premature termination of a contract; and (c) the rules allowing customers to market or broker released capacity do not apply to premature contract tenation.[19]

The Commission also stated that it had accepted NEP's CTC formula, but that it had not accepted nor approved the individual components of the calculation of Norwood's CTC.[20] The Commission set claims relating to the calculation of certain CTC components for hearing, stating that Norwood has the burden of proof on each claim.[21]

10. Pursuant to the July 2 Order, the Honorable Karen V. Johnson was appointed Settlement Judge. Under Judge Johnson's guidance, the Parties and Staff conducted extensive settlement negotiations. Ultimately, these settlement negotiations provided no resolution to any of the issues in the Hearing Order. The Chief Judge terminated the Settlement Judge Proceedings by order dated September 26, 2003 and appointed the undersigned as Presiding Judge.

11. An initial pre-hearing conference was held on October 14, 2003, and a procedural schedule was established. Nor-

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[18] Town of Norwood, 104 FERC ¶ 61,030 at P 18 and Ordering Paragraph A (2003) ("July 2 Order").

[19] *Id.* at P 21.

[20] *Id.* at P 18.

[21] *Id.*

wood filed its Case-in-Chief on November 25, 2003. On December 23, 2003, the undersigned Presiding Judge upheld Respondents' motion to strike portions of Norwood's testimony and gave Norwood leave to make an offer of proof as to those elements of their pre-filed testimony that were stricken. NEP filed its Answering Testimony on December 24, 2003.

12. On February 5, 2004, the undersigned Presiding Judge denied in part and granted in part Staff's Motion to Compel against NEP. Staff filed its Direct Testimony on February 10, 2004. On March 9, 2004, NEP filed its Cross-Answering Testimony. On March 21 and 24, 2004, Norwood filed its Closing Testimony.

13. Pursuant to the undersigned Presiding Judge's Rules for the Conduct of the Hearing, the Parties and Staff created a Joint Statement of Issues on March 31, 2004. The issues identified were:

> *Issue #1:* Whether Respondents base the CTC that they charge Norwood on an erroneous calculation of the estimated market value of the load that Respondents would have had to supply absent early termination of the contract ("the customer's released load").
>
> *Issue #2:* Whether the revenue factor that Respondents relied on to calculate the CTC is incorrect.
>
> *Issue #3:* Whether the rate of return that Respondents use in the CTC calculation is excessive.
>
> *Issue #4:* Whether Respondents' deduction for transmission revenues misapplies the Order No. 888 formula and results in an overcharge to Norwood.
>
> *Issue #5:* Whether Respondents have overstated their fixed power supply costs relating to Norwood resulting in a CTC that is unjust and unreasonable.

14. At the start of the hearing on the morning of April 13, 2004, the undersigned Presiding Judge granted Staff's motion to file the Surrebuttal Testimony and supporting exhibits of Wendelin Whitfield. Respondents were given the opportunity to conduct additional discovery prior to Ms. Whitfield's taking the witness stand. The hearing in this proceeding was conducted on April 13, 14, 15, and 16, 2004.

THE CTC FORMULA

15. An introductory discussion of the CTC formula components would facilitate understanding the issues in this case.[22] NEP states that its formula is based on the stranded costs obligation formula in Order No. 888.[23]

16. NEP witness Schwennesen provides the following description of the CTC formula:

> Under the CTC formula in Tariff No. 1, the CTC payable by a customer who elects to terminate service before the expiration of its contract is determined by applying the following formula:
>
> $$CTC = (R-M) \times L$$
>
> where "R" is the customer's Average Annual Revenue, "M" is the Estimated Market Value of the customer's released capacity, and "L" is the Length of Obligation in years.[24]

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[22] NEP witness Schwennesen's testimony provides a general overview of the CTC formula and then discusses in detail how these components were calculated for Norwood. *See* Ex. NEP-1. The purpose of this discussion is to provide a general understanding of the CTC formula before launching into the various issues that Norwood and Staff present regarding the application of that formula to Norwood.

[23] *See id.* at 14:10 – 18:13 (discussing the similarities and differences between the two formulas and how NEP believes those similarities and differences are significant to Norwood's case).

[24] *Id.* at 6:22 – 7:7.

17. The "R" factor is further broken down:

> The R factor or Average Annual Revenue basically reflects the revenues that NEP is receiving from the customer at the time the customer terminates service, under rates approved by the Commission, reduced by transmission-related revenues. Accordingly, the R factor itself comprises two components corresponding to NEP's total revenues from the customer and the transmission-related portion of these revenues: Total Revenue minus the Transmission Revenue. Total Revenue is the annual average amount of revenues received by NEP from the terminating customer over the three-year period immediately prior to the early termination date under rates approved by the Commission for Tariff No. 1 wholesale requirements service. However, if the rates paid by the customer under the Tariff have changed during that three-year period, Total Revenue is the revenue received from the customer during the twelve months immediately prior to the early termination date.[25]

The Total Revenue component of the R factor is:

> based on the revenues that NEP received from the customer during the relevant three-year or one-year period under the applicable wholesale requirements rates under Tariff No. 1."[26]

The applicable rates are a "snapshot" of the most recently Commission-approved rate for the customer at the time of termination.[27]

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[25] *Id.* at 7:10 – 22.

[26] *Id.* at 8:2 – 4.

[27] *Id.* at 8:10 – 12.

18. The Transmission Revenue component of the R factor is "the sum of two components (both calculated over the same period as Total Revenue)."[28]

The first component is:

> either the annual average of revenues NEP credited to the customer for payments made by the customer to third parties for transmission service under the terms of the service agreement between NEP and the customer, or, if the service agreement does not provide for such credits, the annual average of revenues NEP would have received from the customer using the rates then in effect under NEP's open access transmission tariff.[29]

The second component is:

> the annual average of payments made by NEP to the New England Power Pool ("NEPOOL") for transmission service on the customer's behalf under NEPOOL's Open Access Transmission Tafiff.[30]

19. NEP witness Schwennesen also describes the M factor:

> The "M" factor, or Estimated Market Value, represents the market value of the power that NEP is supplying to the customer at the time of the early termination of Tariff No. 1 service. Under the CTC formula, M itself is the product of several components. M equals the annual average of the Market Price Estimate for each year of the Length of Obligation multiplied by the customer's Released Load.[31]

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[28] *Id.* at 8:14– 15.

[29] *Id.* at 8:15 – 21.

[30] *Id.* at 8:21 – 9:2.

[31] *Id.* at 9:15– 19.

20. The M factor's component Market Price Estimate:

> represents the estimated market value of each kilowatt hour of electricity NEP is supplying to the customer, estimated as of the Early Termination Date. The CTC formula includes a table of kilowatt hour prices to be used in this calculation for the years 1998 through 2007, and provides that prices for 2008 and thereafter will be the prices for 2007 escalated at two percent annually.[32]

21. The other M factor component, the customer's Released Load, is "the annual average of the customer's kilowatt-hour purchased from NEP for the period over which Total Revenue is determined[,]"[33] which is either three years or twelve months, as discussed above.

22. The L factor in the CTC formula is:

> the time difference between the end of the contract term when it is terminated prematurely and what the end of the contract term would have been had there been no early termination.[34]

23. The amount of the CTC is limited in the following way ("the CTC cap"):

> [T]he difference between "R" and "M" cannot exceed the departing customer's annual contribution to NEP's fixed power supply costs under the Tariff, at the time of termination. That annual contribution is in turn defined in the Tariff as the difference between the departing customer's Total Revenue minus Transmission Revenue—which define the R factor applicable to the customer—reduced by NEP's Average Fuel Costs with respect to the customer. NEP's Average Fuel Costs are

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[32] *Id.* at 9:21 – 10:4.

[33] *Id.* at 13:1 – 2.

[34] *Id.* at 13:12 – 15.

> the annual average of revenues NEP receives for its cost of fuel multiplied by the customer's monthly kilowatt-hour purchases during the period over which Total Revenue is determined. . . . [T]his determination is made on a one-time "snapshot" basis, at the time of termination.[35]

Issue 1: Whether Respondents base the CTC that they charge Norwood on an erroneous calculation of the estimated market value of the load that Respondents would have had to supply absent early termination of the contract ("the customer's released load").

Position of the Parties[36]

24. This issue concerns the Market Price Estimate component of the M factor of the CTC.

25. Based on the following reasons, Norwood submits that NEP's estimate for this component is erroneous, resulting in a higher CTC. First, NEP's estimate[37] conflicts with both the actual market values determined in the NEPOOL market[38]

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[35] *Id.* at 13:17 –14:5.

[36] In addition to New England Power Company/National Grid (USA) ("NEP"), other respondents include NEP's affiliates Massachusetts Electric Company ("Mass Electric") and The Narragansett Electric Company ("Narragansett"), and the New England Electric System ("NEES"), the former parent company of NEP, Mass Electric and Narragansett. This Initial Decision will refer to these entities collectively as "NEP" or "Respondents." *See also supra*, n.15.

[37] NEP's market estimates submitted in its CTC filing, Ex. NOR-8 at 15, as amended on December 24, 2003, Ex. NEP-6, result in a total estimated market value of $124.4 million. Norwood IB at 4.

[38] The actual NEPOOL market prices, combined with NEP's forecast of capacity values, result in a total estimated market value of $187.2 million. *Id., citing* Ex. NOR-30 at 10-12; Ex. NOR-31. Norwood claims that the discrepancy of $62.8 million between this figure and $124.4 million, the total estimated market value in Ex. NEP-6, is also unjust and unreasonable because NEP would be able to collect that amount twice: (1)

and NEP's prior CTCs for its affiliates. Norwood IB at 3-8. Norwood submits that the CTC filing on March 18, 1998 allowed for periodic adjustments of the CTC to reflect actual market values, similar to NEP's arrangements with its affiliates Massachusetts Electric and Narragansett. Norwood cites in support the following portion of the letter accompanying the CTC filing:

26. The amendment includes a current estimate of the market value of the power that a customer exercising the early termination option would have received. NEP expects to update that estimate periodically, pursuant to Section 205 and Schedule I, Section B of Tariff No. 1.[39] However, Norwood also describes NEP's counterargument that such an update is precluded by the final sentence in that same footnote which states that:

> Any updated estimates, however, would not affect the contract termination charges payable by a customer that exercised the early termination charge prior to the filing of the update.[40]

27. Norwood posits that NEP purposefully inserted this sentence to preclude Norwood from being privy to the same updates that NEP provided to its affiliates. Norwood contends a customer's only protection against a generating utility "lowballing" the estimate of the CMVE—the component in the stranded cost recovery analogous to the Market Price Estimate—is to allow Norwood to broker the electricity it is not purchasing anymore.[41] Norwood contends that this

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in its Norwood CTC; and (2) by selling the power in the NEPOOL market, in which NEP has been active. Norwood IB at 4, *citing* Tr. 403:16 – 20, 405:4 – 7.

[39] Norwood IB at 5, *citing* Ex. NOR-8 at 2 n.1 (March 18, 1998 filing letter).

[40] Norwood IB at 5-6, *citing* Ex. NOR-8 at 2 n. 1.

[41] Norwood IB at 6, *citing* Promoting Wholesale Competition Through

protection is unavailable to it here because the Commission has held that the rules relating to stranded cost recovery do not apply to the CTC.[42] Norwood claims that the Commission must have left the customer some protection from the "lowballing" possibility described above.[43] Thus, Norwood contends that either the Commission never intended the avoided cost formula to be used when the contract was prematurely terminated or the Commission wanted actual market prices to be used with reconciliations performed periodically.[44]

28. Under the umbrella of this issue, Norwood also contends that it would have to pay any CTC calculated for the 7-year notice period rather than the full demand charges over the remainder of the contract term.[45] Norwood submits that

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Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), FERC Stats. & Regs., Regulations Preambles, January 1991-June 1996 31,036 at 31,842 (1996)(hereinafter "Order No. 888"), *order on reh'g*, Order No. 888-A, 62 Fed. Reg. 12,274 (March 4, 1997), FERC Stats. & Regs., Regulations Preambles, July 1996-December 2001 31,048 (1997) (hereinafter "Order No. 888-A"), *order on reh'g*, Order No. 888-B, 81 FERC 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC 61,046 (1998), *aff'd in relevant part sub nom. Transmission Access Policy Study Group et al., v. FERC*, 225 F.3d 667 Cir. 2000), *aff'd sub nom. New York v. FERC*, 122 S. Ct. 1012 (2002).

[42] Town of Norwood, 104 FERC 61,030 at P 21 (2003).

[43] Norwood IB at 6.

[44] *Id.*

[45] Norwood IB at 7, *citing* Town of Norwood, 104 FERC ¶ 61,030 at P 18 n.19 (2003). NEP contests this point in its Reply Brief. NEP RB at 5 n.7. NEP contends that the Commission rejected Norwood's attempt to raise the issue in this case by its finding that both the Commission and the court of appeals have already held that Norwood was bound to purchase its electricity from NEP through October 31, 2008. *Id., citing* Town of Norwood, 104 FERC ¶ 61,030 at P 20 (2003), *citing* Town of Norwood, 87 FERC ¶ 61,341 (1999), *aff'd* 217 F.3d 24 (1st Cir. 2000), *cert. denied*,

NEP's Exhibit E, filed on March 18, 1998, conflicts with the Commission orders accepting the CTC filing and setting this case for hearing.

29. Norwood claims NEP's estimates conflict with Order No. 888, which requires NEP to make and submit an independent market analysis with supporting workpapers. Norwood IB at 8-10. Norwood bases this claim on the following reasons. NEP did not meet this requirement because it obtained the estimate for the component from the testimony of Mr. Frank Sabatino, of Northeast Utilities ("NU"), in a proceeding before the New Hampshire Public Service Commission ("NHPSC"). Neither of NEP's witnesses performed an independent analysis of the component at issue here. Thus there was no evidence from a witness in the present case, subject to cross-examination. Further, the NHPSC never adopted the calculation the witness submitted. NEP has discussed the comparability of its estimates derived from Mr. Sabatino's testimony to the price of the Norwood-NU contract. Norwood contends that the similarity between the prices does not support the validity of NEP's estimates. Norwood claims that the replacement contract figure would suffer the same weaknesses if it were used for comparison purposes here. Namely, the figure did not have supporting workpapers from NEP, and it also would not allow Norwood to broker the power that it didn't purchase from NEP.[46]

30. Norwood contends that NEP's estimate conflicts with other market projections at the time NEP filed the CTC. *Id.* at 10-11. NEP's witness Hamal was hired in October 2003, did

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532 U.S. 993 (2001); New England Power Co., 83 FERC 61,174 at ¶ 61,722 and n.7 (1998).

[46] Here again, Norwood argues that Order No. 888 requires that Norwood be allowed to broker the power that it did not purchase from Respondents to avoid an intentional low estimate of the Market Price Estimate by NEP. Norwood IB at 9-10.

not perform an independent market analysis as required by Order No. 888, and collected other reports of future market prices. Norwood contends that some of these reports would result in a reduction of stranded cost charges for Norwood of as much as $61.8 million. *Id.* at 10. Norwood's witness Wilson also concludes that using USGenNE's contemporaneous forecast in the same New Hampshire proceeding as Mr. Sabatino would provide a higher Market Price Estimate and, therefore, result in a higher M factor and a lower CTC. *Id.* at 10-11.

31. In its Reply Brief, Norwood poses several other arguments. First, it argues that NEP errs in contending that no true-ups of the M factor are possible under a CTC formula. Norwood also defends its actual energy prices as covering more than just the period from May 1999 to June 2003.[47] Additionally, the forecasts cited by Norwood are relevant to show that entities undergoing a divestiture of their generation assets reported M factor values higher than NEP's M factor.[48] Norwood claims that NEP disregards this evidence.

32. Staff also criticizes NEP's estimates. Similar to Norwood, Staff argues that NEP errs by not justifying the POLARIS model market estimates upon which NEP's estimates are based.[49] Mr. Frank Sabatino ran these estimates in a 1997 New Hampshire proceeding, and Staff argues against

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[47] Norwood RB at 6, *citing* NEP IB at 5-6. Norwood states that it used the same actual energy prices that NEP did for April 1998 through December 1998. Further, based on the update in February 2004, Norwood assumed that for the period from July 2003 to October 31, 2008 the June energy prices would be unchanged. Norwood RB at 6, *citing* Ex. NOR-28; Ex. NOR-29; Ex. NOR-17 at 18 – 19.

[48] Norwood RB at 7 (discussing Norwood's citations to USGenNE, Rosen-BECO and Rosen-CMP forecasts).

[49] Staff IB at 13-15; Staff RB at 2 – 4.

their use.[50] Also, Staff asserts NEP misled the Commission by intentionally concealing the source of its Market Price Estimates,[51] i.e. that NEP did not conduct an independent analysis to calculate its own estimates, thus lending inadequate support to its filing. Staff IB at 15-19. Finally, Staff claims the Norwood-NU contract price and additional forecasts that NEP uses do not support its Market Price Estimates. *Id.* at 19-23. Primarily, Staff contends that the Norwood-NU contract price is inappropriate because it represents one transaction, particularly because it was negotiated under circumstances in which NU was under distress to attract new business.[52] Staff also attacks as unsubstantiated the other forecasts that NEP sets forth. The rationale here is that NEP's witness Hamal did not conduct his own independent analysis. Therefore, he could not evaluate thoroughly the reasonableness of the forecasts' basis.

33. NEP first argues that Norwood's challenges listed above are beyond the proper scope of this proceeding.[53] NEP

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[50] Staff argues against the use of this testimony due to the lack of ability to cross-examine the witness in this proceeding, the lack of evaluation by NEP witness Hamal of the assumptions on which the POLARIS model is based, and the incentive of Mr. Sabatino to use lower estimates because his employer was trying to bolster its own stranded cost claims in the New Hampshire proceeding. Staff IB at 14-15. In its Reply Brief, Staff further supplements this discussion. In particular, it asserts that the POLARIS model is based upon an unrealistic assumption that there are no transmission constraints internal to NEPOOL. Staff RB at 3.

[51] Staff IB at 16, *citing* Tr. 433:12 – 17 (NEP witness Schwennesen stating that NEP did not attach Mr. Sabatino's testimony to its CTC filing). Staff further describes that a discovery dispute during this case yielded drafts of the estimates. Staff posits that the drafts indicated that NEP eliminated the reference to Mr. Sabatino's testimony from the final version of the estimates submitted. Staff IB at 16, *citing* Ex. S-2 at 40 – 62; Tr. 450:25 – 454:2.

[52] Staff IB at 22-23, *citing* Tr. 292:7 – 14, 339:10 – 20.

[53] In its Reply Brief, Norwood responds to this contention. Norwood

contends that the Commission has accepted and approved the CTC, and has held that Norwood's objections to that formula are without merit.[54]

34. Even if those arguments were properly within the scope, NEP submits, Norwood has not met its burden of proof in showing that the estimates are unjust and unreasonable. NEP M at 4. NEP maintains that its formula follows the stranded costs obligation formula in Order No. 888. NEP submits that Order No. 888 provides for a credit based on an up-front estimate of the market value of the departing customer's released load, without true-up adjustments. NEP therefore argues that Norwood's attempts to adjust the forecast after contract termination do not accord with Order No. 888. NEP argues that a certain element of uncertainty is always present in forecasts, that the Commission has recognized this uncertainty,[55] and that Norwood's suggested adjustments do not remove that uncertainty because of the time period they cover.[56]

RB at 2 – 5. Norwood submits that the CTC formula for Norwood does not bind NEP and Norwood, because the Commission has not accepted nor approved the formula. Norwood also contends that NEP's cited cases regarding *res judicata* do not apply here. Norwood RB at 5, *citing* NEP IB at 3 n.5. Norwood contends that the cited cases are inapplicable, and that Staff has confirmed that there has never been an adjudication on the merits that NEP's components for its CTC are just and reasonable. Norwood RB at 5, *citing* Alamito Co., 43 FERC 61,274 (1988); Central Kansas Power Co., 5 FERC ¶ 61,291 (1978); Gaviota Terminal Co., 75 FERC ¶ 63,008 at 65,027 (1990)(ALJ Decision); CNG Transmission Corp., 51 FERC ¶ 63,003 at 65,007-08 (1990).

[54] NEP IB at 3 - 4, *citing* New England Power Co., 83 FERC ¶ 61,174 at 61,723 (1998).

[55] NEP IB at 4 – 5, *citing* Order No. 888 at 31,841; Order No. 888-A at 30,431.

[56] The proposed adjustments from May 1999 to February 2004 cover less than half of the total period of time for which the CTC is calculated. NEP IB at 5 – 6, *citing* Tr. 271.

35. NEP also contends that none of Norwood's alternative forecasts demonstrates that NEP's forecast is unreasonable.[57] Norwood witness Wilson points to a forecast prepared by US Generating Company ("US Gen") for submission to state regulators in 1998.[58] However, in NEP's opinion, this forecast alone projecting higher prices does not mean that NEP's forecast is unreasonable.[59] NEP also criticizes Norwood witness Wilson's comparisons of NEP's forecast to the bids that Norwood received in its solicitation of power supply offers in 1997.[60] NEP points out that these figures were not available to NEP when it filed the CTC amendment, and that the comparison group excludes the two lower bids of the five submitted, including the winning bid by NU.[61] NEP criticizes the comparison to affiliates' prices[62] as an attempt to replace the forecast with post-termination numbers.

36. NEP instead suggests comparing its forecast to the Norwood-NU contract price and/or the reduced price at which Norwood offered to continue purchasing power from NEP for ten years.[63] NEP submits that the NEP market forecast prices

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[57] In its Reply Brief, NEP supplements these comments with criticism about three forecasts that Norwood would prefer to use. NEP RB at 6, *citing* Ex. NEP-10 at 29; Ex. NEP-21. The forecasts projected higher prices than any of the sixteen other forecasts that were available at the time. NEP RB at 6, *citing* Ex. P-21. Further, two of them were derived from the sale prices of generating assets, and NEP claims this aspect is problematic. NEP RB at 6, *citing* Ex. NEP-28 at 26-31. Also, NEP submits that Norwood was unable to identify a single transaction in which any buyer was willing to pay the prices projected in those three forecasts that it preferred. NEP RB at 6, *citing* Tr. 288-89.

[58] NEP IB at 6, *citing* Ex. NOR-9 at 24; Ex. NOR-14.

[59] NEP IB at 7, *citing* Ex. NOR-9 at 24.

[60] NEP IB at 6, *citing* Ex. NEP-10 at 26 – 29; Ex. NEP-21.

[61] NEP IB at 7, *citing* Tr. 289-90; Ex. NEP-10 at 22.

[62] NEP IB at 7, *citing* Ex. NOR-9 at 24.

[63] Both of these prices were slightly lower than NEP's forecast amount.

were very close to the prices in the Norwood-NU contact,[64] the prices in another power supply offer that Norwood received from LG&E Marketing,[65] and the prices in Norwood's offer to continue to buy power from NEP.[66]

Discussion

37. As previously explained, the CTC Formula in NEP's Tariff reduces a terminating customer's CTC by the estimated market value of the electric capacity and energy NEP was selling to the customer at the time of termination. This credit to the customer's CTC obligation, the Estimated Market Value component of the CTC formula (the "M" factor in the formula), equals the product of (i) the customer's load over the twelve months prior to termination (the customer's "Released Load") and (ii) the Market Price Estimate specified in Section B(2)(a) of the CTC Formula for each remaining year in the term of the customer's contract. There is no dispute that, as corrected,[67] NEP appropriately determined Norwood's "Released Load" for purposes of calculating the Estimated Market Value credit set forth in the Tariff's CTC Formula for the years 1998 through 2008, the period which the Commission has determined to be the minimum remaining term of Norwood's contract obligation to purchase its power requirements from

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The offer from Norwood to NEP to pay reduced prices took place on February 27, 1998. NEP IB at 7 – 8, *citing* Tr. 160-61, 167; Ex. NEP-43.

[64] NEP also argues that the replacement contract price is a valid source of comparison. NEP contends that Norwood treats the replacement contract price as a "valid market price" at the time. Norwood used that price as a basis for comparison when it offered to continue to buy power from NEP, if NEP would accept prices slightly below the contract prices. NEP RB at 7, *citing* Ex. NEP-15 at 3; Ex. NEP-43; Tr. 160-61, 167.

[65] NEP RB at 6, *citing* Ex. NEP-10 at 22-23.

[66] NEP RB at 6, *citing* Ex. NEP-43.

[67] Although NEP initially made an error in calculating Norwood's Released Load, that error was corrected. Ex. NEP-1 at 31; Ex. NEP-6.

NEP.[68] However, Norwood and Staff challenge the Market Price Estimate by contending that NEP's reliance on a market price forecast prepared by an independent third party (the "POLARIS" forecast) was inappropriate.[69]

38. It is important to note from the outset that while Norwood challenged virtually every other aspect of NEP's Tariff amendment in Docket No. ER98-2233, it did not challenge the reasonableness of the forecasted market prices that NEP used in the CTC Fomula.[70] NEP's position—that challenges to its use of the Market Price Estimate in its CTC Formula are beyond the proper scope of this proceeding—is credible. However, Staff argues more persuasively that while the Commission "accepted" NEP's Tariff amendment in the May 15, 1998 Order, it did not "approve" it, and that it is appropriate to raise concerns regarding the reasonableness of those price estimates in this proceeding.[71]

39. It is important to ensure a full and complete record on this issue for the Commission's consideration and to facilitate the determination of a just and reasonable CTC, costs of which Norwood may well seek to recover through rate increases to its customers. Therefore, it is the determination of the undersigned Presiding Judge that arguments challenging NEP's

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[68] Town of Norwood, 87 FERC ¶ 61,341 (1999) *reh'g denied without op.*, 88 FERC 61,187 (1999), *aff'd*, 217 F.3d 24 (1st Cir. 2000), *cert. denied*, 532 U.S. 993 (2001).

[69] Ex. NEP-1 at 9-10; Ex. NEP-2 at Schedule II-C, 3-4. NEP based the Market Price Estimate component of the CTC Formula on a projection of energy and capacity prices in New England filed by PS, an affiliate of NU, in a proceeding before the NHPSC in November 1997. Ex. NEP-1 at 10-11; Ex. NEP-3.

[70] Nowhere in Norwood's 72-page rehearing request in that proceeding (Ex. NEP47) did Norwood contend that the Market Price Estimate values were unreasonably low.

[71] New England Power Co., 83 FERC ¶ 61,174 (1998); Ex. S-3 at 11:11. *See also* 18 C.F.R. § 35.4 (1998).

Market Price Estimate in the CTC Formula should be fully considered in this proceeding. However, for the reasons discussed more fully below, the undersigned Presiding Judge finds that Norwood and Staff have failed to establish that the POLARIS forecast Market Price Estimates adopted by NEP renders the Market Price Estimate in the CTC Formula unjust and unreasonable under the facts of this case.

40. In opposing NEP's March 18, 1998 Tariff filing, Norwood argued, among many other things, that Order No. 888 obliged NEP to provide workpapers and supporting assumptions for the market price forecast in the CTC Formula, and that NEP failed to provide the support required for the Tariff amendment by section 35.13 of the Commission's regulations.[72] The Commission specifically considered and rejected these claims, and its rulings were upheld on judicial review; on that basis, the Commission rejected Norwood's attempt to raise them again in this proceeding.[73] Accordingly, these arguments will not be considered further.

41. Next, Norwood challenges NEP's use of the POLARIS forecast based on the divergence between prices that have prevailed thus far in New England's short-term energy

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[72] Ex. NEP-47 at 36-38, 65-66.

[73] Town of Norwood, 104 FERC ¶ 61,030 at P 21 (2003) ("Both the Commission and the court of appeals have found that . . . the rules relating to stranded cost recovery do not apply to a charge for premature termination of a contact"); New England Power Co., 83 FERC ¶ 61,174 at 61,723 (1998)("Norwood's reliance on the stranded cost recovery requirements set forth in 18 C.F.R. § 35.26 (1997) are misplaced, because NEPCO's CTC would recover costs that are solely attributable to a customer's existing Tariff No. 1 contract obligations."); New England Power Co., 84 FERC ¶ 61,175 at 61,920 (1998) ("We will summarily reject Norwood's arguments that the CTC violates the Commission's stranded cost requirements under Order No. 888 . . . ."); *id.* ("Contrary to Norwood's claims, NEPCO properly used our abbreviated filing requirements in this case, because payment of the CTC will not result in a rate increase over the existing Tariff No. 1 rates.").

markets after Norwood's contract termination and the energy prices forecasted in the POLARIS model in 1998 and adopted in the CTC Formula.[74] During the intervening years occasioned by the litigation arising from Norwood's unilateral termination of its energy supply contract with NEP, actual market prices have been lower than those forecasted in 1998. However, the fact that the price forecast NEP used in 1998 did not perfectly predict subsequent energy prices does not satisfy Norwood's burden to prove that the Market Price Estimate in the CTC Formula is unjust and unreasonable.

42. First, NEP's use of "forecasted" market prices is reasonable under the facts of this record, while Norwood's insistence on adjusting the forecast to track "actual" post-termination market prices is not.[75] The Commission has already accepted as reasonable NEP's reliance on "forecasted" prices for electric capacity and energy as the basis of the CTC charged to Tariff No. 1 customers who choose to terminate service and decline NEP's offer to settle their CTC obligation.[76] Further, Norwood's claim that the CTC filing on March 18, 1998 allowed for periodic adjustments of the CTC to reflect actual market values[77] is simply not supported by the plain language of the March 18, 1998 filing letter which provides in pertinent part:

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[74] Norwood accepts the projected capacity prices set forth in the CTC Formula. Tr. 223.

[75] As Staff witness Whitfield acknowledged, "Order 888 and 888-A reject true-ups." Tr. 589:4.

[76] *New England Power Co.*, 83 FERC at 61,723 ("The proposed formula for calculating the CTC would recover the revenues lost . . . less an estimate of the market value of the released capacity and energy. . . . Under the circumstances presented, we find the proposed amendment to be reasonable and therefore will accept it.") (emphasis added).

[77] Norwood IB at 5, *citing* Ex. NOR-8 at 2 n.1 (March 18, 1998 filing letter).

> Any updated estimates, however, would not affect the contract termination charges payable by a customer that exercised the early termination charge prior to the filing of the update.[78]

43. In any event, Norwood's proposed partial replacement of the up-front forecast embodied in the CTC Formula with post-termination energy market prices does not eliminate the need for reliance on uncertain forecasts. None of Norwood's witnesses has produced either: (a) any evidence of the actual energy market prices that preceded the start-up of the NEPOOL spot energy market in May 1999; or (b) a reliable forecast of the prices that will prevail in that market in the future.[79] Furthermore, Norwood's combination of forecasted capacity prices, actual energy prices for a limited period, and speculation as to energy prices before and after that period, far exceeds the prices NEP could reasonably have expected to realize in 1998 in a resale of the power that Norwood refused to continue to purchase.[80] It therefore represents an inappropriate and unreasonable basis for the Estimated Market Value credit in Norwood's CTC.[81]

44. Likewise, Norwood's contention that NEP's Market Price Estimate is unreasonable when compared to three other proposed benchmarks is not persuasive. None of Norwood's proposed alternatives demonstrate that NEP's forecast unrea-

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[78] Ex. NOR-8 at 2 n.1.

[79] Norwood witness Towers' assumptions that prices in the first half of 1999 equaled those in the second half of the year and that prices from July 2003 through October 2008 will equal prices prevailing in June 2003 are completely unsupported. Ex. NEP-10 at 34-35. Staff witness Savitski's assumption that New England electric prices in the future will track historical general energy inflation rates has been discredited as inconsistent with accepted forecasting practice. Ex. NEP-28 at 12-15.

[80] Tr. 229-31; Ex. NEP-50.

[81] Tr. 222, 602-04.

sonably estimated the revenues NEP could have received had it resold the power Norwood had been purchasing. Out of the nineteen forecasts presented in Ex. NEP-21,[82] the only forecasts that project prices materially above Norwood witness Wilson's preferred USGen forecast are two of the forecasts that one analyst inferred from the prices paid by purchasers of generating assets from Boston Edison Company and Central Maine Power Company.[83] However, NEP is correct in its contention that the technique he used to infer the market price expectations of generation buyers is suspect and therefore unreliable.[84] The forecast used by NEP, however, was within the range of other forecasts.[85]

45. Moreover, the market prices in NEP's forecast were very close to, but slightly higher than: (a) the prices in NU's power supply offer to Norwood, which became the prices in the contract that Norwood signed to replace the power it had been buying from NEP; (b) the prices in another power supply offer that Norwood received (from LG&E Marketing);[86] and (c) the prices in Norwood's offer to continue to buy power from NEP.[87] The reasonableness of the CTC Formula's Market Price Estimate is supported by the closeness of those projected prices to the prices in the contemporaneous Norwood/NU contract.

46. In the event that the Commission rejects the POLARIS forecast as a basis for the CTC Formula's Market Price

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[82] A copy of this chart has been provided as "Attachment A" to this Initial Decision as an aid to the Commission.

[83] Ex. NEP-21; Ex. NEP-24.

[84] Ex. NEP-28 at 26-31.

[85] Ex. NEP-21.

[86] Ex. NEP-10 at 22-23.

[87] Ex. NEP-43. NEP's projected market prices were slightly above the prices in each of these other offers, resulting in a larger Estimated Market Value credit and a lower CTC.

Estimate, it is the determination of the undersigned Presiding Judge that Norwood's replacement contract would provide the best evidence of Market Price Estimates under the facts of this case.[88] The replacement contract provides an accurate measure of the competitive market value of the subject capacity and energy prices, and it is contemporaneous with Norwood's decision to unilaterally terminate its energy supply contract with NEP. As NEP witness Hamal explained, the prices in that contract represent the single most persuasive piece of evidence of the market value of the power that Norwood was purchasing from NEP at the time it changed suppliers, since the parties to the contract backed up their price expectations with firm financial commitments.[89] The reasonableness of the prices in the Norwood/NU contract is supported by the fact that the contract was the result of an extensive solicitation process seeking the supply of exactly the same electricity requirements as Norwood's contract with NEP for the same term as that contact,[90] and the fact that Norwood received another offer, from LG&E, with prices very similar to the contract prices.[91]

47. The sale and purchase embodied in the Norwood/NU replacement contract has not been shown to be anything other than an arms length transaction between these market participants; it is reasonable to conclude that Norwood's replacement supplier, NU, would not willingly sell energy to

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[88] As an aid to the Commission, a chart of supporting calculations is appended as "Attachment B" to this Initial Decision. The calculations compare the Total Estimated Market Value, or M factor, using the POLARIS forecasts for the Market Price Estimate (in Column G) versus the Norwood/NU replacement contract price values for the Market Price Estimate (in Column I).

[89] Ex. NEP-10 at 8-9, 19-20.

[90] Tr. 135-38, 291-92.

[91] Ex. NEP-10 at 23; Ex. NEP-17.

Norwood for less than it was worth.[92] Certainly, Norwood's consultant treated the Norwood/NU contract prices as "a valid market price" at the time.[93] In addition, Norwood offered to continue to buy power from NEP, if NEP would accept prices slightly below the Norwood/NU replacement contract prices. Thus, at the time it unilaterally terminated its energy supply contract with NEP, Norwood clearly shared the view expressed by the Commission in Order No. 888 that: "the prices the customer pays its alternative supplier is . . . [an] accurate measure of the competitive market value of the capacity and energy not taken from [its former supplier]."[94]

48. Norwood's current position, that its replacement contract should not be considered for purposes of the Market Price Estimate in the CTC formula,[95] is certainly understandable given the fact that use of those prices would result in a higher CTC for Norwood; however, this position is inconsistent with its decision in 1998 to abrogate its energy supply contract with NEP to avail itself of those prices.

49. Likewise, while Staff does not endorse use of the Norwood/NU replacement contract as a basis for the Market Price Estimate of the CTC formula, Staff rejects outright the

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[92] Ex. NEP-10 at 8-9, 19-20.

[93] Ex. NEP-15 at 3.

[94] Order No. 888 at 31,842.

[95] Ex. NEP-43; Tr. 166-67. Norwood also argues that the prices in Norwood's contract with NU are irrelevant, because Norwood was not offered the opportunity to market or broker the power it had been buying from NEP. Norwood IB at 6, 9. This argument, too, is without merit. First, the Commission has ruled that Norwood was not entitled to the "market or broker" option and explicitly excluded that issue from this proceeding. Town of Norwood, 104 FERC ¶ 61,030 at P 21 (2003), *citing Town of Norwood v. FERC*, 202 F.2d 392, 399 (D.C. Cir. 2000). Moreover, whether or not Norwood was offered the right to market or broker power from NEP is irrelevant to the discussion here of whether the prices in the NU/Norwood contract present valid Market Price Estimates.

Market Price Estimates adopted by NEP using the POLARIS forecast. Staff contends that NEP did not and to date has not substantiated its Market Price Estimates but rather simply listed some numbers on a page from a version of a POLARIS model. Staff witness Savitski further testified that NEP did not provide information about the model specifications, its methodology or its assumptions, to support with confidence the POLARIS model per se or the Market Price Estimates it allegedly produced.[96] Staff concludes that NEP's actions in affirmatively electing not to disclose to the Commission its adoption of the POLARIS model as the basis for its Market Price Estimates,[97] and failing to independently validate its

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[96] Ex. S-3 at 12:1 – 13.

[97] Staff contends that on March 18, 1998, NEP affirmatively concealed from the Commission the New Hampshire testimony of Mr. Frank Sabatino upon which NEPCO relies in this proceeding to justify its "M" values. Staff asserts that NEP chose to exclude the reference to Mr. Sabatino's New Hampshire testimony from the March 18, 1998 filing to mislead the Commission and to thwart any independent investigation of the CTC amendment by hiding from it a red flag about the "M" values in the CTC amendment. Tr. 660:1 – 7; Ex. S-1 at 18:17 – 19; Tr. 654:20 – 655:4; Tr. 661:3 - 24. However, the exigency of the circumstances giving rise to the filing may also provide an explanation for NEP's decision to simply adopt the POLARIS forecast. Specifically, during the pendency of its federal litigation alleging a breach of contract by NEP, Norwood sent a letter to NEP on March 4, 1998, notifying the company that it was terminating the contract effective April 1,1998. In the interim, on March 18, 1998, NEP sought approval from FERC to require the payment of a CTC in the event a requirements contract customer, such as Norwood, wished to terminate its power contract early. The amendment also allowed NEP's requirements contract's customers to switch immediately to a competing supplier without the seven years' notice as provided in the original contract. Over Norwood's objection, FERC accepted the CTC amendment with an effective date of March 31, 1998. The First Circuit upheld the Commission's action accepting NEP's later imposition of the CTC on Norwood. *See Town of Norwood v. FERC*, 202 F.3d 392, 398-402 (D.C. Cir. 2000).

Market Price Estimates, render its Market Price Estimate of the CTC formula unjust and unreasonable.

50. Staff makes a forceful argument that NEP did not provide the Commission with enough information to support the forecasted prices it filed with its CTC Tariff amendment in 1998.[98] However, Staff does not address the next level of analysis required to determine if the Market Price Estimates used in NEP's CTC Formula result in an unjust or unreasonable CTC charge under the facts of this case, and if so, what alternative market price forecast should be used to calculate the CTC instead.[99] Specifically, Staff does not assert that NEP's adoption of the POLARIS forecast *in fact* resulted in unjust and unreasonable future market prices estimates.[100] The evidence of record[101] underscores this point. Staff's concern, that because NEP did not independently validate its Market Price Estimates, NEP could not, and did not, thoroughly evaluate the reasonableness of the forecasts' basis at the time of its filing, is credible; however, this concern does not address the ultimate issue of the reasonableness of the resulting Market Price Estimates adopted by NEP in the calculation of the "M" factor of the CTC.

51. Perhaps more importantly, Staff does not present a defensible alternative. Assuming that the POLARIS forecast is rejected for the reasons urged by Staff, as previously ex-

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[98] Ex. S-3 at 4-5, 7; Ex. NEP-28 at 6.

[99] Tr. 668.

[100] *Id.* at 598-99, 668.

[101] This includes the evidence showing that NEP's Market Price Estimates were close to (though slightly higher than) the prices in Norwood's replacement contract with NU, the purchase offer that Norwood made to NEP in 1998, and the supply offer that Norwood received from LG&E in 1998, as well as the evidence showing that the Market Price Estimates were well within the range of price forecasts that were available at the time.

plained, the next best alternative is the Norwood/NU replacement contract. Staff's position is that the prices in the Norwood/NU contract do not reflect competitive market prices. Staff IB at 19-23. This position fails to address the evidence, discussed above, demonstrating that the prices that Norwood agreed to pay, and NU agreed to accept, in the contract they signed on March 3, 1998, with NU constituted "a valid market price."[102]

52. Because the prices in the Norwood/NU contract and Norwood's offer to NEP both are slightly below those Market Price Estimates,[103] the credit that Norwood received against its CTC obligation is *greater* and results in an overall *lower* CTC for Norwood using the POLARIS forecast prices. Norwood, recognizing this fact, contends that replacement contract prices should not be used because Order No. 888 gives the customer, not the utility, the option to use the prices in its replacement contract as the measure of the market value of the power it was purchasing.[104] Norwood cannot have it both ways.

53. Given that Norwood's replacement contract provides the best evidence of Market Price Estimates under the facts of this case but that the prices in the Norwood/NU contract

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[102] Ex. NEP-15 at 3. Norwood witnesses McDonald and Wilson, as well as Staff witness Savitski also agreed. NEP M at 8 n.16, *citing* Tr. 165 (McDonald); Ex. NOR-38 at 21 (Wilson); Ex. NEP-38 at 101 (Savitski, referring to "lengthy" contemporaneous contracts).

[103] The prices in the CTC Formula (Ex. NEP 13), the Norwood/NU contract (*id.*), and Norwood's offer to NEP (Ex. NEP-43) are compared in the following table (all prices are in cents per kilowatt hour):

	1998	1999	2000	2001	2002	2003	2004	2005	2006	2007	2008
CTC Market Price Estimates	3.81	3.86	3.88	3.86	3.94	4.05	4.12	4.21	4.33	4.48	4.57
Norwood/NU Contract	3.54	3.50	3.80	3.80	3.90	4.00	4.10	4.15	4.30	4.40	4.50
Norwood Offer to NEP	3.04	3.29	3.42	3.61	3.78	3.78	4.00	4.10	4.25	4.35	4.45

[104] Norwood IB at 9; *see also* Order No. 888 at 31,842.

produce a *higher* CTC than the Market Price Estimate resulting from use of the POLARIS forecast, it is reasonable to conclude that the Market Price Estimate used to calculate Norwood's CTC has not been shown to be unjust or unreasonable. In consideration of the adverse impact on Norwood's customers of abrogating the POLARIS forecast prices in favor of the only other viable option, the Norwood/NU replacement contract prices, it is the determination of the undersigned Presiding Judge that the POLARIS forecast Market Price Estimates adopted by NEP do not render the Market Price Estimates in the CTC Formula unjust and unreasonable under the facts of this case.

54. Norwood and Staff cannot meet their burden of proof in this complaint proceeding by simply attacking the level of support that NEP has provided for the price forecast used to calculate the Estimated Market Value credit in Norwood's CTC; they must prove through credible record evidence that the Estimated Market Value resulting from the use of those Market Price Estimates is unjust and unreasonable and they must offer a just and reasonable alternative.[105] They have failed to do so. Rather, for the reasons discussed above, the record evidence supports a finding that use of the Market Price Estimates from the POLARIS forecast provides Norwood a more favorable result than use of the next best alternative, Norwood's replacement contract prices.

Issue 2: Whether the revenue factor that Respondents relied on to calculate the CTC is incorrect.

Position of the Parties

55. This issue involves the Total Revenue component of the R factor.

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[105] Norwood and Staff have the burden of proof in this case. Town of Norwood, 104 FERC ¶ 61,030 at P 18 (2003).

56. NEP explains that the Total Revenue component is equal to the revenues that NEP received from Norwood over the twelve months prior to Norwood's termination of its purchases from NEP on April 1, 1998.[106] NEP claims that the Commission already rejected Norwood's argument that the CTC produces excessive returns.[107]

57. NEP also believes that its use of the W-95(N) rates to calculate the Total Revenue component is consistent with its Tariff, Order No. 888, and Order No. 888-A. NEP contends that the Commission stressed the benefits of using "present revenues" to calculate the "RSE" component of the stranded costs obligation fomula.[108] That approach provides certainty to customers contemplating a change in suppliers and avoids disputes over whether the present rates were excessive or inadequate.[109] The Commission explained that if a customer contemplating a change thought that its present supplier's rates were excessive, then it should file a complaint under Section 206 to reduce those rates before terminating service.[110] NEP points out that Norwood did not do so. NEP IB at 12, *citing* Tr. 213.

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[106] NEP IB at 11, *citing* Ex. NEP-1 at 19-20, Ex. NEP-6. These rates are NEP's received revenues from Norwood through Norwood's payments of the W-95(N) rates under Tariff No. 1. Those rates were the product of a settlement between NEP and Norwood in Docket No. ER95-267-000. The Commission accepted the settlement on September 14, 1995 and the rates became effective on July 12, 1995. NEP IB at 11, *citing* Ex. NEP-1 at 19; Ex. NEP-5.

[107] NEP IB at 11-12, *citing* New England Power Co., 83 FERC ¶ 61,723 (1998).

[108] NEP IB at 12, *citing* Order No. 888 at 31,841; Order No. 888-A at 30,427-28.

[109] NEP IB at 12, *citing* Order No. 888 at 31,841; Order No. 888-A at 30,427.

[110] NEP IB at 12, *citing* Order No. 888-A at 30,427.

58. Norwood asserts that the Total Revenue component is erroneously high for several reasons,[111] including the fact that it fails to reflect a 28% reduction in the annual W-95 revenues based upon NEP's divestiture of certain assets, which the Commission approved on February 25, 1998.[112] Norwood illustrates the results of the 28% reduction in a table.[113] These results vary according to the estimates used. Using NEP's estimate of the M factor[114] would reduce the R-M component of the CTC to $16,925,796.[115] Using Norwood's proposed actual market value estimate of the M factor would yield a negative value for the R-M component, $45,868,930.[116] Norwood submits that in such a scenario, calculations indicate that NEP profited by reselling Norwood power in the NEPOOL market and that therefore Norwood would not owe a CTC.[117]

59. Staff agrees with Norwood that the Total Revenue component should be adjusted to reflect divestiture sales that were known and measurable at the time. Staff IB at 23, *citing* Ex. NEP-27 at 37:27 – 38:1. NEP's CTC amendment describes the Total Revenue component as equal to one of two formulas. The first scenario is that the total revenues

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[111] Norwood notes that Issues 3 and 4 address two other issues that affect the R factor, i.e. the allegedly excessive rate of return and NEP's alleged failure to eliminate all transmission costs. Norwood IB at 11 n. 8.

[112] Norwood RB at 9, *citing* Ex. NOR-11 at 2 – 3 (Affidavit of NEP witness Schwennesen describing effect of divestiture on CTC for affiliates); New England Power Co., 82 FERC 61,179 (1998).

[113] Norwood IB at 12. The Discussion section below displays a modified version of Norwood's table.

[114] Based on the challenged subcomponent of the M factor discussed in Issue 1.

[115] *Id.*

[116] *Id.*

[117] *Id.*

"shall equal" the annual average of revenues received by NEP. Staff IB at 24. The second scenario applies when there is a change in the cost-of-service rate within the last 36 months; then the R factor "shall be determined using" a customer's revenue for the last 12 months.[118] Staff has interpreted the language difference between the two scenarios as NEP not equating the R factor to the last 12 months of revenues in the second scenario. Accordingly, Staff submits, the 12-months revenue (under the second scenario) is just a starting point, to which adjustments may be made. *Id., citing* Ex. S-3 at 13:8 – 14.

60. Staff recommends adjustments to reflect divestiture sales that were known and measurable at the time. Staff argues that NEP knew when it made the CTC filing that it would sell its non-nuclear and nuclear assets to a third party at prices above their book value, and yet did not adjust the R factor accordingly.[119] According to Staff, NEP should have adjusted the R factor for divestiture sales that were known and measurable at the time.[120] In addition, NEP factored in the divestiture in the settlements into which it entered with its affiliates prior to the CTC filing.[121] Staff contends that NEP should have done the same for Norwood.[122]

61. In its Reply Brief, NEP responds to the contention that the effect of the divestiture of its generating assets was known

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[118] Staff IB at 24, *citing* Ex. S-23 at Original Page 2.

[119] Staff IB at 24 – 25, *citing* Ex. S-7 at 2 – 3 (1997 Annual Report of NEES filed in March 1998 with the United States Securities and Exchange Commission in which NEES stated that: "We are delighted to report that the purchase price will effectively recover our investments not only in our fossil and hydro plants, but in nuclear plants as well.").

[120] Staff IB at 25 – 26, *citing* Tr. 327:17 – 328:1. Staff borrows this "known and measurable" criterion from 18 C.F.R. § 35.13 (2004). Tr. 616-619.

[121] Staff IB at 25 – 26, *citing* Tr. 473:10 – 474:6.

[122] Staff IB at 26, *citing* Ex. S-3 at 14:11 – 13.

and measurable. NEP contends that Norwood did not believe that NEP's planned divestiture would reduce NEP's revenues from Norwood. NEP RB at 13, *citing* Ex. NEP-49 at 39. Rather Norwood represented to the Commission that the planned divestiture would "likely result in a substantial increase over and above the present rate." NEP RB at 13, *citing* Ex. NEP-49 at 39. NEP cites this statement to refute Staff's contention that the divestiture would have a known and measurable downward effect on the Total Revenue component. NEP RB at 13.

Discussion

62. At issue here is whether the Total Revenue component of the R factor should have been adjusted[123] to reflect divestiture sales that were known and measurable at the time and, if so, whether NEP's failure to do so renders the CTC as applied to Norwood unjust, unreasonable or unduly discriminatory. The undersigned Presiding Judge has fully considered the evidence of record, the arguments of the parties and Staff as set forth in their initial and reply briefs, and the totality of the circumstances existing at the time of NEP's CTC filing. For the reasons discussed below, the Total Revenue component of the R factor should have been adjusted to reflect divestiture sales that were known and measurable at the time; such an adjustment is necessary to ensure

[123] The Commission may have "approved the use of the CTC for early termination of the contract and . . . accepted NEPCO's CTC formula . . . ." Town of Norwood, 104 FERC ¶ 61,030 at P 18 (2003), *citing* New England Power Co., 83 FERC ¶ 61,174 at 61,723 (1998). However, in setting this claim for hearing, the Commission held that it has "not accepted the individual components of the CTC formula . . . . [and] has not approved the individual components used in NEPCO's calculation of Norwood's CTC." *Town of Norwood*, 104 FERC ¶ 61,030 at P 18. In doing so, the Commission disposed of the issues the complaint raised that had already been litigated, and it set this issue for hearing. NEP has not persuasively argued that this issue has been litigated. Accordingly, the undersigned Presiding Judge rejects such arguments.

that the CTC charge is not unjust, unreasonable or unduly discriminatory as applied to Norwood.

63. While the Total Revenue component of the R factor should have been adjusted to reflect divestiture sales that were known and measurable at the time, NEP otherwise properly calculated the Total Revenue component using the actual revenues that it received from Norwood during the twelve months preceding the contract termination.[124] NEP correctly notes that the Commission has emphasized the benefits of using the "present revenues" approach to calculate the "RSE" component under its Order No. 888 stranded costs obligation formula[125] to provide certainty to customers contemplating a change in suppliers and to avoid disputes over whether the rates were excessive or inadequate.[126] While the Commission and the D.C. Circuit Court of Appeals have held that rules related to stranded cost recovery do not apply to a charge for a premature termination of a contract,[127] NEP

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[124] *See* Ex. NEP-1 at 19:12 – 20:8. NEP notes that it made a calculation error by submitting estimated values of its revenues for February and March 1998 instead of actual values. This use was permitted because actual values were not knownat the time, but the CTC requires NEP to replace these values with actual values within six months after the termination of the contract. NEP did not do so at the time. However, it has corrected the value prospectively, and this correction has not affected any actual amounts paid because Norwood has not yet paid the CTC charge. The W-95 rate was the product of a settlement approved on September 14, 1995, which was within three years of the contract. Accordingly, NEP calculated the Total Revenue component using the actual revenues that it had received from Norwood during the twelve months preceding the contract termination.

[125] NEP IB at 12, *citing* Order No. 888 at 31,841; Order No. 888-A at 30,427-28.

[126] NEP IB at 12, *citing* Order No. 888 at 31,841; Order No. 888-A at 30,427.

[127] Town of Norwood, 104 FERC ¶ 61,030 at P 21 (2003), *citing* New England Power Co., 83 FERC ¶ 61,174 at 61,273, *reh'g denied*, 84 FERC

is correct in observing that the use of "present revenues" here is supported by the same goals.[128] Further, NEP correctly observes that Norwood could have, and should have, filed a complaint under Section 206 to decrease its rates if it thought those rates were unreasonable.[129] In light of the fact that Norwood elected not to do so, it is reasonable to use those Commission-approved rates in calculating the actual revenues that NEP received from Norwood during the twelve months preceding the contract termination for the Total Revenue component of the CTC.

64. As the procedural history of this case reflects, Norwood did not file a Section 206 complaint with the Commission seeking to reduce its rates under its contract with NEP. Rather, Norwood elected to unilaterally terminate its contract with NEP, thereby exposing itself to contract termination charges under NEP's Tariff and exposing both parties to extensive litigation concerning this issue. As previously discussed, the Commission and the D.C. Circuit Court of Appeals have held that rules related to stranded cost recovery do not apply to a charge for a premature termination of a contract.[130] In addition, while the stranded costs obligation formula in Order No. 888 may be similar to the subject CTC formula because NEP based the latter on the former,[131] the

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¶ 61,175 (1998); T*own of Norwood v. FERC*, 202 F.3d 392, 398-399 (D.C. Cir. 2000).

[128] The Commission announced in Order No. 888 the need to provide certainty to customers contemplating a change in suppliers and to avoid disputes over whether the rates were excessive or inadequate. Order No. 888 at 31,841; Order No. 888-A at 30,427.

[129] NEP IB at 12, *citing* Order No. 888-A at 30,427.

[130] Town of Norwood, 104 FERC ¶ 61,030 at P 21 (2003), citing New England Power Co., 83 FERC ¶ 61,174 at 61,273, *reh'g denied*, 84 FERC ¶ 61,175 (1998); *Town of Norwood v. FERC*, 202 F.3d 392, 398-399 (D.C. Cir. 2000).

[131] Ex. NEP-1 at 14:20 – 15:20.

formulas also differ in key respects,[132] as do the circumstances of their respective applications. Applying the Commission's and D.C. Circuit Court of Appeals' holdings here, it would be inappropriate to consider Order No. 888 and its progeny to be controlling precedent in this case;[133] rather, the task here is to determine a just and reasonable compensation for NEP for the consequences imposed upon it by Norwood's unilateral decision to terminate its business relationship with NEP.[134]

65. As previously discussed, Staff submits that the 12-months revenue calculation is just a starting point, to which adjustments may be made.[135] Staff recommends adjustments to reflect divestiture sales that were known and measurable at the time. Staff argues that NEP knew when it made the CTC filing that it would sell its non-nuclear and nuclear assets to a third party at above their book value, and yet, NEP did not adjust the R factor accordingly.[136] While the record demonstrates that the impending divestiture of its non-nuclear assets was well-known to NEP at the time it filed the CTC, the record does not support the same conclusion with respect to NEP's nuclear assets.

66. On October 1, 1997, the Respondents filed an application with the Commission for "Required Approvals . . . for Divestiture of Generating Business and Related Matters."[137] Norwood IB at 11, *citing* Ex. NOR-12 at 1-19. The application stated that "the proceeds of the divestiture of the

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[132] *Id.* at 15:21 – 17:2.

[133] *Town of Norwood*, 104 FERC 61,030 at P 21; *Town of Norwood v. FERC*, 202 F.3d at 398-99.

[134] Staff IB at 17.

[135] Staff IB at 24, *citing* Ex. S-3 at 13:8 – 14.

[136] Staff IB at 24 – 25, *citing* Ex. S-7 at 2 – 3.

[137] The application was assigned Docket Nos. EC98-1-000 and ER98-6-000. Norwood IB at 11.

NEES Companies' generating business are to be credited to NEP's wholesale customers . . . to reduce by about 50 percent the costs that otherwise would be stranded by the introduction of competition."[138] NEP witness Schwennesen submitted testimony under oath with the application that described the impact of the divestiture on CTCs in the wholesale settlements,[139] filed with the CTC, in the following manner:

> [T]he divestiture results in . . . savings that will reduce the Contract Termination Charge agreed to in the Wholesale Settlement from 2.8 cents per kilowatt hour to 1.5 cents per kilowatt . . . This reduction in the Contract Termination Charge, together with a 3.2 cent per kilowatt hour Standard Order Charge (at the retail meter) produces a 28% decrease in the wholesale rates to Mass Electric and Narragansett as compared to the W-95(S) rate in effect today . . .[140]

Thus, the CTCs for NEP's affiliated customers were based on a reduction of the W-95 rates to account for the upcoming divestiture.[141] The Commission approved the divestiture and the CTCs for the affiliates.[142]

67. NEES[143] touted the upcoming divestiture to investors in its 1997 Annual Report with the Securities and Exchange Commission, filed in March 1998.[144] NEP was already plan-

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[138] Norwood IB at 11, *citing* Ex. NOR-12 at 2.

[139] These settlements occurred with affiliated wholesale NEP customers, which comprised 98% of NEP's wholesale business. Norwood RB at 9, *citing* Ex. NOR-11 at 2 – 3.

[140] Norwood IB at 11, *citing* Ex. NOR-11 at 2 – 3.

[141] Norwood RB at 9, *citing* Ex. NOR-11 at 2 – 3.

[142] Norwood RB at 9, *citing* New England Power Co., 82 FERC ¶ 61,179 (1998).

[143] NEES is the former parent company of NEP. *See supra*, n.15.

[144] Ex. S-7 at 2-3 (1997 Annual Report of NEES filed in March 1998 with the United States Securities and Exchange Commission).

ning for the divestiture, expecting employees to depart for the buying company, and estimating the benefits for investors.[145] NEP had already signed the contract for the sale of its non-nuclear assets. The settlements with NEP's affiliated customers discounted these assets by reducing the W-95 rate by 28%.[146] NEP therefore knew it would divest these assets soon,[147] and the affiliates' CTCs demonstrate that the effect of the divestiture was measurable at the time that NEP filed the CTC for Norwood.[148] In contrast, while the NEES 1997 Annual Report shows that NEP was planning to divest the nuclear assets as well, those transactions occurred piecemeal between 2000 and 2002.[149]

68. Thus, the record supports the finding that the impending divestiture of its non-nuclear assets was well-known to NEP at the time it filed the CTC and the Total Revenue component of the R factor should have been adjusted to reflect the impending divestiture of those assets. Staff raises legitimate concerns regarding the justness and reasonableness of including the non-nuclear assets in the revenue stream through the contract termination period of October 2008 when NEP had already contracted to divest those assets at the time that it filed the CTC.[150] Further, NEP's affiliates' settlements discount these assets by reducing the W-95 rate by 28%; this fact supports the conclusion that failure to reflect this known and measurable divestiture of assets in the calculation of the

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[145] *Id.*

[146] Ex. NOR-11 at 2-3.

[147] *See, e.g.*, Ex. S-7 at 2-3.

[148] Staff argues that although Norwood's ability to successfully file and win a rate case in the future may not have been known, NEP's sale of assets was a known and measurable event at the time of the contract termination. Staff IB at 25-26.

[149] Ex. S-7 at 2 – 3; Tr. 477:8 – 483:10.

[150] *See, e.g.*, Staff RB at 13 – 17.

Total Revenue component of the R factor would be unduly discriminatory as to Norwood.

69. While Norwood and NEP's affiliates are clearly not "similarly situated" in as much as Norwood elected to unilaterally breach its contract with NEP while NEP's affiliates resolved their issues by settlement,[151] this rationale does not support the disparate treatment occurring here. NEP was fully aware at the time it filed the subject CTC that Norwood was the only one of its customers to whom the CTC would apply.[152] NEP's fai ıre to adjust the revenue stream to account for the assets that it knew it would soon be divesting, while doing so for its own affiliates, is not only unjust and unreasonable, but also it is unduly discriminatory in the context discussed here. Of course, even factoring in the adjustment for the divestiture of the non-nuclear assets, Norwood will not be treated exactly like the settling affiliates. The settling affiliates will receive adjustments to accord with actual market values, and their CTCs span a different term. NEP will not receive such "true up" adjustments during the lifespan of the CTC because the undersigned Presiding Judge has already ruled that NEP's Market Price Estimate will be used.[153] But these particular differences are not unjust, unreasonable or unduly discriminatory given the fact that Norwood elected to unilaterally breach its contract with NEP while NEP's affiliates resolved their issues by settlement.

70. After fully considering the evidence of record, the arguments of the parties and Staff as set forth in their initial and reply briefs, and the totality of the circumstances existing at the time of NEP's CTC filing, it is the determination of the undersigned Presiding Judge that the Total Revenue component of the R factor should be adjusted to reflect the dives-

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[151] *Town of Norwood v. FERC*, 202 F.3d 392, 402-04 (D.C. Cir. 2000).

[152] Tr. 467:6 – 12.

[153] *See supra*, Issue 1 Discussion.

titure of NEP's non-nuclear assets. The table below, provided as an aid to the Commission, compares the numerical effect of the divestiture on R and (R-M) using various R and M values. The first row shows the values as proposed in NEP's CTC. The second row shows the NEP revenue reduced 28% to account for the divestiture in conjunction with NEP's Market Price Estimate value incorporated into M. The third row shows the NEP revenue reduced by 28% in conjunction with the Norwood-NU replacement contract price substituted as the Market Price Estimate value incorporated into M. Finally, the fourth row shows the 28% reduction to R in conjunction with Norwood's proposed actual prices incorporated into M.

Effect of Divestiture on Revenue (R) and (R) – (M) Four Scenario Comparison[154] (Not Including Interest)			
	Revenue (R)	Market Value (M)	Difference R – M
Total Claim NEP Revenue and NEP Market Value	$196,270,432[155]	$124,388,915[156]	$1,881,517
NEP Revenue reduced 28% with NEP Market Value	$141,314,711[157]	$124,388,915[158]	$16,925,796
NEP Revenue	$141,314,711[159]	$121,405,494[160]	$19,909,217

[154] This table is adapted from the one presented in Norwood's Initial Brief to compare values for R and M proposed by the parties and values that the undersigned Presiding Judge has considered in this Initial Decision. *See* Norwood IB at 12.

[155] Ex. NEP-6 at 1.

[156] *Id.*

[157] The R in Ex. NEP-6 at 1 is reduced by 28% to account for the divertiture. Norwood IB at 12.

[158] Ex. NEP-6 at 1.

[159] Norwood IB at 12.

[160] This calculation originates from the Norwood/NU contract as set

reduced 28% with Norwood-NU Value			
NEP Revenue reduced 28% with Actual Market Value	$141,314,711[161]	$187,183,641[162]	–$45,868,930

71. The table provided above to aid the Commission reflects the calculations pursuant to this Initial Decision. Interest is not included in these calculations. Incorporating the adjustment to the Total Revenue calculation, the R factor is $141,314,711. The M value, using NEP's proposed Market Price Estimate, is $124,388,915. Accordingly, the R-M value is $16,925,796.

Issue 3: Whether the rate of return that Respondents use in the CTC calculation is excessive.

Position of the Parties

72. NEP represents that the CTC does not specify a rate of return in the calculation. NEP M at 13. NEP also contends that the issue has already been litigated.[163] NEP M at 13. Specifically, NEP contends that Norwood's CTC is based upon the actual revenues it received from Norwood under the W-95(N) rates in the twelve months prior to Norwood's termination. NEP RB at 15. NEP submits that the Commission rejected Norwood's argument—that NEP's current revenues should not be used to calculate CTCs because of

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forth in a chart presented by NEP. NEP IB at 8 n.17, *citing* Ex. NEP-13. *See also* Attachment B. These calculations have been provided as an aid to the Commission. *See supra*, n.88.

[161] Norwood IB at 12.

[162] *Id.*, *citing* Ex. NOR-31 at 1.

[163] Staff disagrees with this contention in its Reply Brief. Staff RB at 17 – 18.

what Norwood considered to be excessive earnings—by finding NEP's reliance on unadjusted actual revenues "to be reasonable."[164]

73. Norwood submits that the CTC's rate of return is excessive. Specifically, the actual returns on equity ("ROE") by NEP[165] for the years 1995 to 1997 averaged 16.4%, higher than the 10.2% ROE that Staff used in 1997 as the midpoint of a "zone of reasonableness" for NEP, to justify the terms of the CTC agreement with NEP's affiliates.[166] Accordingly, Norwood submits that this difference requires a rollback of the W-95 demand charge by $1.94.[167] This reduces the gross revenue by $1,138,931, based on the twelve-month period ended March 31, 1998, as amended by NEP on December 24, 2003.[168] Norwood also disputes NEP witness Schwennesen's objections to this methodology. Norwood IB at 14-15.

74. In its Reply Brief, Norwood disputes NEP's contention that this issue is outside the scope of this case. Norwood RB at 9 – 10. Norwood points out that the Commission decided to set this issue for hearing.[169] Norwood also contends that NEP is precluded from attacking this decision because it did not seek rehearing of the order setting this issue for hearing. *Id.* at 10. Norwood also contends that NEP did not address the merits of the issue. *Id.* at 10.

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[164] NEP RB at 16, *citing* New England Power Co., 83 FERC ¶ 61,174 at 61,723 (1998), *reh'g denied*, 84 FERC ¶ 61,175 at 61,920 (1998).

[165] This ROE is based on the W-95 rate revenues.

[166] Norwood IB at 13, *citing* Ex. NOR-18; Ex. NOR-17 at 10:13 – 11:13; Ex. NOR-25 at Workpaper No. 7.

[167] Norwood IB at 13, *citing* Ex. NOR-30 at 6 - 7; Ex. NOR-31 at 3.

[168] Norwood IB at 13, *citing* Ex. NOR-30 at 6 - 7; Ex. NOR-31 at 3.

[169] Norwood RB at 10, *citing* Town of Norwood, 104 FERC 61,030 at PP 13, 18 (2003).

75. Staff partially agrees with Norwood. Staff agrees that the CTC would yield an excessive rate of return for NEP. Staff disagrees with the amount of excess. Staff submits that Norwood's calculations for the rate of return are also high. Norwood's rate of return does not reflect NEP's ownership of generating assets, which were still at a nominal risk of non-recovery, for a period of time after March 1998.[170] However, Staff agrees that NEP's rate of return is excessive, and that it is therefore unjust and unreasonable.

Discussion

76. This issue pertains to whether NEP earns an excessive rate of return from the CTC that it is charging Norwood. The Commission set this issue for hearing rather than disposing of it at the outset with a group of issues that had been litigated in earlier proceedings.[171] Accordingly, the undersigned hereby rejects the argument that this issue is outside the scope of this case.

77. However, Norwood—and Staff, to the extent that it challenges the CTC—has the burden of proof[172] to show that the challenged aspects of the CTC are unjust, unreasonable and/or unduly discriminatory. In addition to the allegations above, Norwood also claims that the rate of return that NEP seeks to obtain from its CTC would be 2,843%.[173] However, beyond these allegations, Norwood offers little justification for the "rollback" it recommends.[174]

78. Staff also does not meet its burden of proof. It agrees that the rate of return is excessive.[175] However, although Staff

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[170] IB at 26, *citing* Tr. 254:21 – 255:5.

[171] Town of Norwood, 104 FERC ¶ 61,030 at PP 18 – 21 (2003).

[172] *Id.* at P 18.

[173] The supporting calculation appears in Ex. NOR-34.

[174] *See* Ex. NOR-17 at 14:9 – 15:8.

[175] Staff IB at 26.

disagrees with the amount of excess that Norwood proposes,[176] Staff fails to offer a proposed rate of return that it deems would be just, reasonable and not unduly discriminatory.

79. In conclusion, Norwood and Staff have not persuasively met their burden to show why the rate of return should be modified. The undersigned Presiding Judge has noted elsewhere in this Initial Decision that the "actual revenues" used by NEP are just, reasonable, and not unduly discriminatory once they are adjusted downwards 28% to account for the divestiture.[177] This finding will reduce the overall rate of return that NEP will receive from the CTC that it charges NEP. However, Norwood and Staff have not presented any independent basis under the heading of this issue to cause the undersigned Presiding Judge to make additional adjustments to the overall rate of return that NEP earns from the CTC.

Issue 4: Whether Respondents' deduction for transmission revenues misapplies the Order No. 888 formula and results in an overcharge to Norwood.

Position of the Parties

80. This issue concerns the first component of Transmission Revenue, which is one of the components of the R factor.

81. NEP states that the CTC reduces the revenues by a credit that accounts for the portion of revenues NEP received from the customer attributable to transmission costs, and submits that this methodology is consistent with the Order No. 888 stranded costs obligation formula. The credit has two components; NEP submits that only one is at issue here.[178]

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[176] *Id.*

[177] *See supra*, Issue 2 Discussion.

[178] Norwood does not challenge the component of Transmission Revenue that reduces NEP's Total Revenues from Norwood by the amounts

The credit reduces NEP's Total Revenues from the customer by either: (1) the annual amount of any transmission credit in NEP's service agreement with the customer; or (2) if the service agreement does not provide for such a credit, the revenues NEP would have received from the customer under its open access transmission tariff ("OATT").[179] NEP applied the first of these alternatives because the Norwood-NEP contract provided for a specific transmission credit to compensate Norwood for the amounts that it paid to Boston Edison Company ("BECO").[180]

82. NEP characterizes Norwood as contending that it is entitled to a transmission revenue credit based on NEP's transmission costs, rather than the transmission credit in its service agreement. NEP submits that this contention is inconsistent with the CTC formula and contradicts the testimony of Norwood's testimony.[181]

83. Staff appears to agree with NEP. Staff witnesses testified that NEP accurately captured the offset for transmission revenues because Norwood was a transmission customer of BECO, not NEP.[182] Norwood paid BECO for the transmission and received a credit from NEP for that purchase. Thus, NEP's foregone transmission-related revenues from the Norwood contract do not reflect their own transmission costs. Rather, the foregone revenues reflect the credit.

84. Norwood contends that NEP's deduction for transmission revenues misapplies the Order No. 888 formula,

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that NEP paid annually to NEPOOL for transmission service on behalf of Norwood. NEP IB at 14.

[179] NEP IB at 14, *citing* Ex. NEP-1 at 8-9; Ex. NEP-2 at Schedule II-C at Original Page No. 3.

[180] NEP IB at 14, *citing* Ex. NEP-1 at 26-27; Ex. NEP-6.

[181] NEP IB at 15, *citing* Tr. 278; Ex. NEP-51 at 6.

[182] Staff IB at 27, *citing* Ex. S-1 at 15:16-22; Ex. S-3 at 15:7 – 8.

resulting in NEP overcharging Norwood. According to Norwood, NEP uses a stranded cost formula that provides that the transmission-related revenues must be deducted from the overall revenues.[183] The CTC deducted from the revenue stream a $1,117,328 billing credit to which Norwood was entitled under the W-95N rate. However, Norwood claims, this leaves a part of NEP's transmission revenues included in the revenues used to determine the R factor. Norwood posits that this inclusion contravenes the requirement of Order No. 888 relating to stranded costs that NEP claims to be following. Norwood witness Towers has identified the full transmission adjustment as requiring a $1,301,184 reduction in the revenue representing NEP's transmission costs.[184] Norwood submits that this deduction is NEP's own allocation of its transmission costs among its Tariff No. 1 customers.[185]

85. Norwood claims that the inclusion of part of the transmission costs in the CTC conflicts with both the 1983 antitrust settlement agreement between Norwood and NEP and the Order No. 888 stranded cost provision. First, the settlement agreement required BECO to furnish all of the transmission service for delivery of NEP's power to Norwood.[186] Second, the Commission's Regulations relating to Order Nos. 888 and 888-A stranded costs expressly preclude assessment of any stranded costs against Norwood because Norwood does not depend on any of the Respondents' transmission services. In pertinent part, these regulations state:

> § 35.26 Recovery of stranded costs by public utilities and transmitting utilities.

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[183] Norwood IB at 15, *citing* Order No. 888 at 31,839.

[184] Norwood IB at 15, *citing* Ex. NOR-30 at 9:3 – 16; Ex. NOR-17 at 17:19 – 18:8.

[185] Norwood M at 15 – 16, *citing* Ex. NOR-20.

[186] Norwood IB at 16, *citing* Ex. NOR-4 at 4.

> *(a) Purpose.* This section establishes the standards that a public utility or transmitting utility must satisfy in order to recover stranded costs.
>
> *(b) Definitions.*—(1) *Wholesale stranded cost* means any legitimate, prudent and verifiable cost incurred by a public utility or transmitting utility to provide service to:
>
> (i) A wholesale requirements customer that *subsequently becomes, in whole or in part, an unbundled wholesale transmission services customer of such public utility or transmitting utility.*[187]

Norwood contends that NEP knew that Norwood was not subject to stranded costs under Order No. 888.[188] Thus, Norwood claims this inclusion would contradict stranded costs obligation principles.

Discussion

86. As previously discussed, the Transmission Revenue component of the R factor is "the sum of two components (both calculated over the same period as Total Revenue)."[189] The first component is at issue here, and is defined as:

> *either the annual average of revenues NEP credited to the customer for payments made by the customer to third parties for transmission service under the terms of the service agreement between NEP and the customer*, or, if the service agreement does not provide for such credits, the annual average of revenues NEP would have re-

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[187] Norwood IB at 16, *citing* CCH FERC Statutes & Regulations ¶ 13,976 (18 C.F.R. § 35.26)(emphasis added by Norwood).

[188] Norwood IB at 16.

[189] Ex. NEP-1 at 8:14 –15.

ceived from the customer using the rates then in effect under NEP's open access transmission tariff.[190]

87. The undersigned Presiding Judge concurs with NEP's and Staff's assessment that NEP's calculation of the Transmission Revenue is just, reasonable and not unduly discriminatory. NEP correctly applies the first option because the Norwood-NEP contract provided for a specific transmission credit to compensate Norwood for the amounts that it paid to BECO.[191] Norwood acknowledges that its agreement with NEP required BECO to furnish all of the transmission service for delivery of NEP's power to Norwood. Norwood IB at 16. Thus, NEP's application of the first option accords with the Norwood-NEP agreement and with the CTC.

88. Staff and NEP correctly note that, as a circumstance of the Norwood-NEP contract, Norwood was a transmission customer of BECO rather than of NEP.[192] Norwood paid BECO for the transmission and received a credit from NEP for doing so. Therefore, NEP's foregone transmission-related revenues are accurately reflected by the credit that NEP provided Norwood rather than by the actual transmission costs that NEP incurred. Staff IB at 27. Throughout the period that Norwood was purchasing power from NEP, its payments and NEP's revenues were reduced by the transmission revenue set forth in the contract; Norwood's payments were not reduced by an allocation of the W-95(N) rates between power supply and transmission costs.[193] Furthermore, under these calculations, NEP has provided a trans

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[190] *Id.* at 8:15 – 21 (emphasis added).

[191] NEP IB at 14, *citing* Ex. NEP-1 at 26 – 27; Ex. NEP-6.

[192] NEP IB at 14, *citing* Ex. NEP-1 at 26-27; Ex. NEP-6; Staff IB at 27, citing Ex. S-1 at 15:16 – 22; Ex. S-3 at 15:7 – 8.

[193] NEP IB at 15, *citing* Ex. NEP-1 at 35.

mission credit that adequately compensates Norwood for the transmission payments that it had to make to BECO.[194]

89. Norwood has not met its burden to demonstrate convincingly that this component of Transmission Revenue should be modified. Norwood agrees that it was a transmission customer of BECO. Norwood IB at 16. Further, Norwood does not dispute that NEP provided it a credit that adequately covers the costs that Norwood incurred in paying BECO. Norwood's arguments for modification are unpersuasive. First, Norwood appears to contend that because NEP has allocated its own transmission costs among all of its Tariff No. 1 customers, the CTC's treatment of Norwood would be inconsistent with Norwood's status as acknowledged in the 1983 settlement agreement between the parties. Norwood IB at 15 – 16, *citing* Ex. NOR-20. The exhibit that Norwood cites[195] appears to include actual transmission costs as applicable to all Tariff No. 1 customers, including Norwood. However, as previously discussed, NEP's service agreement with Norwood did provide for such a transmission credit, and NEP's calculation is just, reasonable and not unduly discriminatory given the facts of this case.[196] Thus, the undersigned Presiding Judge rejects the contention that the treatment of Norwood is inconsistent with the terms of the 1983 settlement agreement between the parties. Norwood also generally contends that it should receive credits for NEP's actual transmission costs; otherwise, contrary to stranded cost principles, Norwood would be subject to NEP's stranded costs for transmission services.[197] However, the Commission has specifically rejected Norwood's comparisons between the

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[194] NEP IB at 15, *citing* Ex. NEP-8 at 2.

[195] Ex. NOR-20.

[196] NEP IB at 14, *citing* Ex. NEP-1 at 26 – 27; Ex. NEP-6.

[197] Norwood IB at 15 – 16.

present case and Order No. 888 and its progeny.[198] Therefore, the undersigned Presiding Judge also rejects Norwood's comparisons to the stranded costs obligation methodology.

Issue 5: Whether Respondents have overstated their fixed power supply costs relating to Norwood resulting in a CTC that is unjust and unreasonable.

Position of the Parties

90. This issue pertains to the CTC cap.

91. NEP argues that its CTC formula is closely modeled after the stranded costs obligation methodology in Order No. 888.[199] NEP also addresses Staff's and Norwood's argument that the CTC formula should account for the divestiture of NEP's non-nuclear assets shortly after the contract termination. NEP contends that the issues have already been litigated before the Commission. NEP IB at 16. The Commission's decisions to accept the CTC as "reasonable," and to set certain claims for hearing, exclude these arguments from the scope of the proceeding, according to NEP. *Id.* NEP elaborates that if these issues are within the scope of this case, then they have no merit. *Id.*

92. NEP argues that the purpose of the CTC cap is to ensure that Norwood does not pay a greater contribution to NEP's fixed power supply costs via the CTC than it made through the rates it was paying immediately prior to termination. *Id.* at

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[198] New England Power Co., 83 FERC ¶ 61,174 at 61,723 (1998) ("Norwood's reliance on the stranded cost recovery requirements set forth in 18 C.F.R. § 35.26 (1997) are misplaced, because NEP's CTC would recover costs that are solely attributable to a customer's existing Tariff No. 1 contract obligations."); New England Power Co., 84 FERC ¶ 61,175 at 61,920 (1998)("[W]e will summarily reject Norwood's arguments that the CTC violates the Commission's stranded cost requirements under Order No. 888 . . .

[199] NEP IB at 15, *citing* Ex. NEP-1 at 14-15, 38-39; Ex. NEP-27 at 50-51; Order No. 888 at 31,840.

16 – 17. NEP contends that Norwood witness Towers agrees with this assertion.[200] NEP therefore claims that the possibility of Norwood making a different contribution to NEP's fixed power supply costs is irrelevant to the calculation of the CTC cap. *Id.* at 17. Even if the non-nuclear divestiture were taken into account, NEP contends, the record does not support speculation that Norwood would have paid lower rates as a result of the divestiture. Id. at 17-18.

93. NEP also contends that Order No. 888-A holds that the revenue stream estimate[201] automatically includes an offset for the market value of any generating assets reflected in the utility's rates that are worth more than their book value.[202]

94. NEP also disputes Staff's and Norwood's contentions that NEP's CTC cap overstates NEP's fixed power supply costs and understates NEP's variable costs. These contentions advocate a methodology that the Commission rejected in Order No. 888-A, according to NEP.[203] NEP contends that the effects of the divestiture were not a "known and measurable" phenomenon at the time that it filed the CTC because NEP

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[200] NEP IB at 16-17, *citing* Tr. 248-249.

[201] This forms the basis of the cap both in the stranded costs obligation formula and the CTC formula.

[202] NEP IB at 18, *citing* Order No. 888-A at 30,438-39; Ex. NEP-52 at 7-8 ("If present rates include some assets that have a market value that exceeds net book value . . . the formula automatically captures the described offset because the revenue stream is based on the lower book value of the utility's assets rather than their higher market value.").

Staff contests this point. It states that the cited Order No. 888-A provision assumes the continuing availability of the fixed assets to supply electric service to a customer for which revenue is to be paid. Staff RB at 24, *citing* Order No. 888-A at 30,438-39 ("The revenue stream is based on present rates, which are based on the net book value of all of the underlying assets used to provide the service.") Staff contends that this is not the case here. Staff RB at 24.

[203] NEP IB at 19, *citing* Order No. 888-A at 30,425, 30,438.

still had to obtain eight regulatory approvals before the transaction could close.[204] NEP also claims that even if the costs were "known and measurable," Staff and Norwood do not present a fully supported direct estimate of NEP's fixed power supply costs after the divestiture. NEP criticizes Staff witness Whitfield's estimates. NEP IB at 20-21. NEP also disputes Staff's contention that NEP's CTC cap unreasonably categorizes the cost of fuel as a measure for its variable power supply costs. *Id.* at 21. NEP states that it included the cost of fuel as a proxy for its variable power supply costs. *Id.* The Commission's acceptance of the CTC methodology - as a "reasonable" implementation of the Order No. 888 standard cost methodology—supports this inclusion.[205] NEP concedes that it may have certain other variable power supply costs that are not included in the cost of fuel, as defined in the Tariff; however, it contends that neither Staff's nor Norwood's witnesses have identified these costs. *Id.*, *citing* Tr. 666.

95. NEP also disputes as outside the scope of the hearing and without merit the contention that the CTC cap must be adjusted to treat Norwood comparably to other Tariff No. 1 customers.[206] These customers agreed in settlements to pay CTCs that provided for a credit for the net proceeds of sales for NEP's generating

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[204] NEP IB at 19-20, *citing* Ex. NEP-27 at 40 – 41; Ex. NEP-33.

[205] NEP IB at 21, *citing* New England Power Co., 83 FERC ¶ 61,174 at 61,723 (1998). NEP explains that in Order No. 888-A, the Commission recognized that the variable component of a wholesale power sale is "mostly fuel cost." NEP IB at 21 n.38, *citing* Order No. 888-A at 30,433.

[206] Norwood disputes this contention in its Reply Brief. Norwood RB at 15-16. NEP stated in letters to Norwood after its CTC filing that the Mass Electric settlement offer would be available until August 1998. *Id.* at 16. However, Norwood states that NEP never actually offered that CTC to Norwood in any of the settlement conferences held after the filing. *Id.*, *citing* Tr. 140:25 – 141:5; Tr. 172:11 – 173:25. Norwood also contends that NEP has not presented evidence indicating that it made such an offer to Norwood. Norwood RB at 16, *citing* Tr. 412:16 – 19; Tr. 416:4-7; Tr. 417:2-4.

assets. NEP IB at 22. NEP claims that it repeatedly offered Norwood the option to pay a CTC proportional to the CTCs that these other customers paid,[207] but that NEP refused to pay any CTC. NEP also contends that Staff's proposal would cap the CTC at a lower amount than the settlment CTCs paid by these other customers because they agreed to pay the same rate for 30 years or longer. Id. at 23, citing Tr. 239, 628. Here, Norwood would pay the rate for approximately ten-and-one-half years. Staff IB at 23. NEP also disputes the contention that it must adjust the CTC payment for Norwood to remain competitive with NEP's affiliated distribution companies. *Id.* at 24. NEP submits that Norwood's customer's rates are well below those charged by NEP-affiliated distfibutors.[208] *Id.*, citing Ex. NEP-41 at 1-2; Ex. NEP-42.

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[207] NEP IB at 22.

[208] Norwood responds that it purchased all the power it required at the same rates as NEP's affiliates Mass Electric and Narragansett. Norwood RB at 16. Norwood states that if it had lower electric rates for its customers than the affiliates, then it could only have been due to efficiencies in its distribution system. *Id., citing* Tr. 153: 16-19, 154:19-21. Norwood further submits that NEP ignores Norwood witness McDonald's testimony regarding commercial and industrial load and instead focuses only on that regarding the residential load. *Id.* at 16-17. Residential load comprises 25% of Norwood's load. *Id.* at 17. Norwood provides a table to which its witness McDonald referred under cross-examination by NEP. *Id.* The table depicts the relationship between Norwood and Mass Electric, and the effect that a 25% rate increase—to provide revenue to pay a proposed CTC of $78 million—would have on those rates. *Id.* Norwood submits that such a rate increase would put it at a competitive disadvantage compared to NEP's affiliates. Norwood RB at 17. Norwood's table follows. *Id.*

RETAIL RATE COMPARISON
Norwood and NEP's Affiliate Mass Electric (MECO)

	Norwood	MECO	% above MECO	w/25% raise	% above MECO
Commercial	10.24	8.72	17.4%	12.80	46.8%
Industrial	7.48	7.73	-3.2%	9.35	21.0%

96. Norwood contends that NEP has overstated its fixed power supply costs, and that this overstatement results in an unjust and unreasonable CTC. Norwood first compares the CTC cap[209] with the Order No. 888 cap on any stranded cost charges under a revenues lost fomula.[210] After explaining the circumstances of NEP's divestiture,[211] Norwood cites Order No. 888, which states that:

> If a stranded cost claim involves divestiture of assets, the amount of stranded costs associated with those assets would be the book value less the sale price. The Commission would determine the appropriate stranded cost charge based on the facts presented.[212]

Residential	7.73	9.46	-18.3%	9.66	2.1%
Overall	8.36	8.96	-6.7%	10.45	16.6%

Conclusion: If Norwood raised its rates 25% to pay the $78 million CTC, its commercial rates would be 47% higher and its industrial rates would be 21% higher.

Overall, its rates would be 17% higher than NEP's affiliate MECO.

Rates in cents per kWh from the Energy Information Administration Dec. 2003 report.

[209] 4. Maximum Contract Termination Charge

> In no event shall the difference between "R" and "M" as determined in Sections I and II exceed the Customer's annual contribution to the Company's fixed power supply costs under this Tariff. . . .

Norwood IB at 17, *citing* Ex. NOR-8 at 13.

[210] Application of the foregoing formula and collection of the resulting stranded costs are subject to the following conditions:

> 1. *Cap on SCO.* The quantity (RSE—CMVE) can be no greater than the average annual contribution to fixed power supply costs (defined as RSE less variable cost) that would have been made by the departing generation customer had it remained a customer.

Norwood IB at 17, *citing* Order No. 888 at 31,840.

[211] *See* Norwood IB at 17-18.

[212] *Id.* at 18, *citing* Order No. 888 at 31,842.

Norwood witness Towers calculated two versions of the CTC cap. One version[213] subtracted the fixed cost of the plant subsequently divested from the W-95 rate.[214] Under this version, Norwood's contribution to NEP's remaining fixed costs would be $1.7 million per year,[215] for a total of $18.3 million over the 10-year, 7-month period to October 31, 2008, having a present value at April 1, 1998 of $12.5 million. The second version uses the fixed costs that NEP used to develop the CTCs paid by its affiliates.[216] This calculation results in a calculation of a CTC cap of $7,459,963.[217]

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[213] Norwood IB at 18, *citing* Ex. NOR-32 at 3.

[214] W-95 is the rate under which Norwood was purchasing electricity from NEP. Norwood IB at 18.

[215] NEP has proposed a $7.2 million annual charge over the same period. Norwood IB at 18, *citing* Ex. NOR-30 at 12:5 – 14:13; Ex. NOR-32 at 1-la. Norwood contends that this is similar to Mr. Towers' direct testimony in Ex. NOR-17 at 2:5-22:13 and Ex. NOR-22, but adjusted to account for the error in the calculation discussed by NEP's witness Schwennesen in Ex. NEP-1 at 20:17 – 21:13.

[216] *See* Norwood IB at 19, *citing* Ex. NOR-35; Ex. NOR-30 at 17:16 – 20:3; Ex. NEP-35. However, Norwood notes two differences between the figures its witness Towers used and those that NEP witness Schwennesen used in her Ex. NEP-35. First, he eliminated from the "fixed costs" the $205 million in "bonuses" that Norwood claims NEP conferred upon its affiliates. Second, he increased the Residual Value Credit to reflect NEP's divestiture of its nuclear facilities.

[217] Norwood witness Towers' adjustments to the fixed costs result in stranded costs recoverable from NEP's customers over a 31-year, 6-month period of $1.682 billion. Norwood states that because it would share with the other customers in 10 years and 7 months of this time, Mr. Towers reduced the figure further to 33.598% of these costs, amounting to $565.1 million recoverable from NEP's customers during the time period in which Norwood would share. Norwood's share represents 1.32% of these costs. Norwood IB at 19-20, *citing* Tr. 364:19-25, 365:1-3. $565.1 million times 1.32% would yield $7,459,963. Norwood IB at 20, *citing* Ex. NOR-35 at 1:2-3.

97. For the following reasons, Norwood also disputes NEP's assertion that it should pay 18% per annum interest from the time of the original bill in 1998.[218] First, Norwood submits that the CTC filing requires that the prime rate must be used in calculating interest here.[219] Second, the interest rate here reflects a Tariff provision for delinquent customer bills. Norwood claims that this provision is inapplicable here because it has not paid the bill due to its contesting the filing, not due to delinquency. Third, such an interest rate exceeds NEP's actual cost of money since 1998.

98. Staff submits that NEP has overstated the CTC cap. Staff IB at 27-31. If the Order No. 888 stranded cost provisions are applicable here,[220] then in the unique scenario in which a utility claims stranded assets and then divests those assets, the Commission will account for the divestiture proceedings when deciding the appropriate recovery.[221] Staff submits that the CTC cap includes some variable costs as fixed costs. Id.

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[218] NEP submits that this issue is outside the scope of this proceeding. NEP RB at 21-22. NEP asserts the interest rate is irrelevant in the discussion of the CTC cap. *Id.* at 22. Further, Norwood raised this claim in the Massachusetts State court, and the Massachusetts Appeals Court rejected the contention as without merit. *Id.*, citing New England Power Co. v. Town of Norwood, Case 01-P-1467, slip op. at 6 (Mass. App. Ct. 2003). Most of Norwood's interest obligation pertains to CTC bills that were rendered prior to the February 21, 2003 refund effective date that the Commission established in this case. NEP RB at 22 n. 25, *citing* Town of Norwood, 104 FERC ¶ 61,030 at P 22 (2003). NEP submits that the appellate court noted that even assuming that Norwood's arguments were timely and had merit, Norwood would be liable for the CTC charges that preceded the refund effective date, including the associated interest. NEP RB at 22 n. 25, *citing New England Power Co. v. Town of Norwood*, slip op. at 6.

[219] Norwood IB at 22, *citing* 18 C.F.R. § 35.19a (1998).

[220] NEP states that the CTC was modeled after the Order No. 888 stranded cost provisions. Staff M at 28, *citing* Ex. NEP-1 at 14:10 – 17:18.

[221] Staff IB at 28, *citing* Ex. S-1 at 19:14-30.

at 31-32. Staff claims this inclusion is contrary to Order No. 888. Order No. 888 establishes a maximum stranded costs obligation as revenues minus "variable costs." Thus, the inclusion of a portion of variable costs into fixed costs allows for the subtraction from revenue of only a subset of variable costs,[222] which then leads to a higher stranded cost maximum, or CTC cap. This higher CTC cap would allow NEP to recover more than the fixed power supply costs to which Staff believes NEP is entitled. Also, Staff believes that the cap should not depend on revenue from divested fixed assets. Id. at 32. Staff submits that currently, the R factor does not account for divestiture; therefore, the CTC cap currently includes certain fixed costs that have been divested. Id. Staff instead advocates the revised CTC cap developed by Staff witness Whitfield. This revised CTC cap determines fixed power supply costs and allocates to Norwood its share of those costs for the balance of the contract term.[223]

Discussion

99. As previously discussed, the amount of the CTC is limited in the following way ("the CTC cap"):

> [T]he difference between "R" and "M" cannot exceed the departing customer's annual contribution to NEP's fixed power supply costs under the Tariff, at the time of termination. That annual contribution is in turn defined in the Tariff as the difference between the departing customer's Total Revenue minus Transmission Revenue—which define the R factor applicable to the customer—reduced by NEP's Average Fuel Costs with respect to the customer. NEP's Average Fuel Costs are the annual average of revenues NEP receives for its cost of fuel multiplied by the customer's monthly kilowatt-

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[222] This subset is the cost of fuel. Staff IB at 31.

[223] *Id.* at 32, *citing* Ex. S-1 at 20:19 – 21:18.

> hour purchases during the period over which Total Revenue is determined. . . . [T]his determination is made on a one-time "snapshot" basis, at the time of termination.[224]

100. As NEP witness Schwennesen further explains:

> [S]ince the first part of this calculation is the same as the first part of the CTC calculation (the "R" factor), the cap effectively amounts to a requirement that the Estimated Market Value of the electricity that NEP has been selling to the customer (the "M" factor) be greater than or equal to the average fuel costs that NEP recovered from the customer immediately before the early termination of service. As long as the deduction from the CTC charge for the Estimated Market Value of the electricity sold to Norwood is greater than or equal to the fuel costs that NEP recovered from Norwood, the test is satisfied.[225]

101. The issue of whether the CTC cap is just, reasonable and not unduly discriminatory, is properly within the scope of this case. The Commission determined that it had not been previously litigated and set the issue for hearing.[226] NEP has not convincingly demonstrated otherwise. Therefore, the undersigned Presiding Judge rejects NEP's contentions that this issue is outside the scope of this case or has already been litigated.

102. One significant point of contention for parties is the issue of whether the CTC cap overstates fixed power supply costs due to the inclusion of certain fixed assets that NEP divested shortly after Norwood's termination of the contract. For the same reasons discussed under Issue 2, the undersigned Presiding Judge concurs with Staff and with Norwood that NEP must account for the divesture of its non-nuclear

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[224] Ex. NEP-1 at 13:17 – 14:5.

[225] *Id.* at 38:14-22.

[226] Town of Norwood, 104 FERC ¶ 61,030 at P 18 (2003).

assets when applying the CTC, or the CTC cap, formula to Norwood. However, as previously discussed, NEP's nuclear assets are not subject to this same inclusion because the divesture of these assets have not been shown to have been known and measurable at the time that NEP made its CTC filing.

103. On a related note, the parties have also contested the issue of whether the CTC formula accounts for NEP[227] NEP has generally contended that its CTC already includes an offset for the market value of any generating assets reflected in the utility's rates that are worth more than their book value.[228] NEP cites Order No. 888-A as holding that the stranded costs obligation formula's revenue stream did include the above-described offset.[229] NEP posits that because its CTC formula is based on the stranded costs obligation formula and that formula's revenue stream accounts includes such an offset, Staff's proposed adjustment is unnecessary.[230] However, Staff correctly counters that the cited Order No. 888-A provision assumes the continuing availability of the fixed assets to supply electric service to a customer for which revenue is to be paid, which is not the circumstance in the instant case.[231] Staff also correctly observes that the cited provision does not pertain to establishing a stranded cost obligation "cap" when the utility has divested itself of fixed assets by selling them on the market. Staff RB at 24. Nor does the provision concern the need to avoid double recovery of fixed assets that would occur once through the sale above

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[227] Staff IB at 29, *citing* Ex. S-7.

[228] NEP IB at 18.

[229] *Id.*, *citing* Order No. 888-A at 30,438-39.

[230] NEP IB at 18, *citing* Order No. 888-A at 30,438-39.

[231] Staff RB at 24, *citing* Ex. NEP-52 at 30,439 ("The revenue stream is based on present rates, which are based on the net book value of all of the underlying assets *used to provide the service*.") (emphasis added).

book value, and then again through collecting revenues from Norwood as though the fixed assets were still on the books. *Id.* Thus, even of the undersigned Presiding Judge were to entertain the comparison to the stranded costs obligation methodology, Norwood's argument would be inappropriate. The CTC formula's revenue stream, and therefore the CTC cap, does not currently account for the divestiture of non-nuclear assets. The undersigned Presiding Judge has already discussed the adjustments to the revenue stream that are necessary to make the CTC just, reasonable and not unduly discriminatory. Consistent with those findings, the undersigned Presiding Judge therefore concurs with Staff's position regarding this issue as to the non-nuclear assets.

104. The parties also dispute whether NEP overstated the CTC cap by including certain variable costs as fixed costs. The undersigned Presiding Judge concurs with Staff's view that the CTC formula inappropriately includes certain variable costs as fixed costs and that this inclusion is unjust and unreasonable. Staff IB at 31-32. Staff persuasively argues that the CTC cap provision is internally inconsistent. *Id.* One aspect of the CTC cap establishes a maximum charge as based on the contribution to fixed power supply costs.[232] This portion may model after the stranded costs obligation formula;[233] however, the CTC cap only excludes from rev-

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[232] As NEP witness Schwennesen explains when defining the CTC cap:

> [T]he difference between "R" and "M" cannot exceed the departing customer's annual contribution to NEP's fixed power supply costs under the Tariff, at the time of termination.

Ex. NEP-1 at 13:17-19.

[233] In the process of describing similarities between the CTC formula and the stranded costs obligation formula, NEP witness Schwennesen states:

> Finally, both formulas provide for a limitation on charges based on the customer's contribution to its supplier's fixed power supply costs at the time of termination, calculated by deducting variable

enues the fuel costs, which are just a subset of variable costs in the stranded costs obligation formula.[234] NEP has acknowledged that the term "variable costs" is broader and may include certain costs besides fuel costs.[235] Accordingly, there is an inconsistency between the CTC formula and the stranded costs obligation formula after which it was modeled which "countenances the possibility that the CTC maximum cost recovery would include more than fixed power supply costs." *Id.* This inconsistency limits the usefulness of arguments that the CTC formula is modeled after the stranded costs obligation formula and that therefore the requirements of stranded cost principles should apply here. Further, as the undersigned Presiding Judge has emphasized elsewhere in this Initial Decision, stranded costs obligation principles are not controlling in determining the justness and reasonableness of the CTC or the CTC cap formulas.[236]

105. In response to Staff's arguments regarding the improper inclusion of certain variable costs as fixed costs, NEP has contended that certain fixed costs are considered part of the cost of fuel, as though this inclusion may offset the variable costs which are being treated as fixed costs.[237] This contention only adds confusion regarding the appropriateness

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> costs from the total revenues the customer was pang . . . ; as I explained, the Tariff No. 1 CTC formula includes a detailed provision for the calculation of this cap on CTC charges.

Id. at 15:15-20 (internal citation omitted).

[234] *See id.* at 13:19 – 14:5; NEP IB at 21 n.38, citing Order No. 888-A at 30,433.

[235] Ex. NEP-28 at 22:16-17; Ex. NEP IB at 21.

[236] Town of Norwood, 104 FERC 61,030 at P 21 (2003), *citing* New England Power Co., 83 FERC 61,174 at 61,273, *reh'g denied*, 84 FERC 61,175 (1998); Town of Norwood v. FERC, 202 F.3d 392, 398-399 (D.C. Cir. 2000).

[237] Staff RB at 23, *citing* NEP M at 21 – 22, *citing* Tr. 512- 512; Ex. S-25 at 54th revised page 1 and 47th revised page 2.

of the formula. Further, even if an offset were considered, the record does not support a finding that the two categories would equalize each other.

106. Staff correctly observes that NEP drafted the provision and is therefore responsible for its consequences. Staff RB at 23, *citing* Restatement (Second) Contracts § 206 (1981). Here, the CTC cap as proposed is unjust and unreasonable because the record demonstrates that the formula inappropriately includes certain variable costs as fixed costs. NEP, as author of the CTC, bears the responsibility to correctly apportion which costs fall into which category and to set forth an internally consistent formula. Staff RB at 23. NEP contends that the Commission has already found the CTC formula to be reasonable,[238] and this argument could support the position that the CTC should not be modified. Although the Commission found the CTC formula to be reasonable, the Commission did not accept and approve the CTC's various components.[239] Thus, findings that NEP has overstated fixed power supply costs in the manners discussed above have not been precluded.

107. Because NEP's CTC cap improperly included fixed non-nuclear assets that had been divested, and inappropriately quantified certain variable costs as fixed costs, NEP's proposed CTC cap is rejected. Further, because both versions of Norwood's CTC appear to have included the effects of the divestiture of NEP's nuclear assets,[240] and the undersigned Presiding Judge has already held that such an inclusion is unsupported by the record, Norwood's proposed CTC caps are rejected. Rather, findings that NEP has overstated fixed power supply costs in the manner discussed above support the adoption of the revised CTC cap recommended by Staff.

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[238] NEP IB at 16.

[239] Town of Norwood, 104 FERC ¶ 61,030 at P 18 (2003).

[240] Norwood IB at 19, *citing* Ex. NOR-35; Ex. NOR-30 at 17:16 – 20:3.

108. Staff initially calculated the CTC cap to be about $9,028,554, relying on information from NEP's CTC with its affiliate Mass Electric.[241] NEP witness Schwennesen pointed out that this initial calculation excluded fixed as opposed to variable costs, and that in the CTC settlement with Mass Electric, all the costs in the variable component element of the settlement were indeed fixed costs that do not vary with output.[242] Staff witness Whitfield relied on these representations to revise the CTC cap it proposed to $25,403,742.[243] Consistent with the holding of this Initial Decision, this calculation accounts for the divestiture of non-nuclear assets in September 1998 but not for the later divestiture of nuclear assets.[244]

109. Finally, although interest is not a component of the CTC formula, Norwood attempts to argue yet again that it should not have to pay the 18% interest that the CTC filing entitles NEP to charge. The undersigned Presiding Judge concurs with NEP that the issue has already been litigated. As the

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[241] Staff IB at 30, *citing* Ex. NEP-35; Ex. NEP-27 at 55:9-13, 57:1-11.

[242] Staff IB at 28-29, *citing* Ex. S-1 at 22:18; Ex. S-2 at 23.

[243] Ex. S-12. NEP has pointed out the inconsistencies in Staff's first calculation of the CTC cap. However, NEP possesses custody and control of the records necessary to clarify which costs fall into which category. Therefore, NEP has the burden of production to clear up inconsistencies that it has pointed out regarding Staff's initial calculations. NEP has had the opportunity during this case to clear up any inconsistencies that may have resulted from a hastily filed CTC and should therefore be held responsible for the consequences of the CTC cap provision. Further, NEP should not be allowed to dispute the credibility of the revised calculations, which are based upon new information provided by NEP. This holding does not disturb that Commission's directive that the party challenging the CTC holds the burden of proof. Town of Norwood, 104 FERC ¶ 61,030 at P 18 (2003). Rather, it ensures that the CTC that NEP charges Norwood is just, reasonable and not unduly discriminatory.

[244] Staff IB at 29-30; Staff RB at 24-25.

Massachusetts Appeals Court noted in its unpublished decision:[245]

> We have also considered Norwood's arguments with respect to mitigation of damages and the inclusion of an improper interest rate in the calculation and conclude that they lack merit.[246]

In a footnote to this sentence, the Massachusetts Appeals Court continues:

> We similarly have reviewed all the supplemental filings, as well as the recent decision of the FERC that relates to this case. See Norwood v. National Grid USA, 104 FERC 61,030 (2003). Norwood's assertions to the contrary, we find nothing in the FERC Order that warrants a conclusion other than the affirmance of the Superior Court. . . .[247]

110. The Massachusetts Appeals Court finding is undisturbed, given that the Supreme Court of Massachusetts denied review of the opinion and the U.S. Supreme Court recently denied the petition for writ of certiorari.[248] The interest rate is not a component of the CTC formula and was not identified by the Commission as an issue for hearing in this case. Therefore, the undersigned Presiding Judge rejects Norwood's attack on the interest rate as res judicata and outside the scope of this proceeding.

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[245] For the Commission's convenience, a copy of that opinion has been appended as Attachment C.

[246] *New England Power Co. v. Town of Norwood*, Case 01-P-1467, slip op. at 6 (Mass. App. Ct. 2003), *further appellate review denied*, 799 N.E.2d 594 (Mass. 2003), *cert. denied*, 2004 U.S. LEXIS 3861 (2004).

[247] *New England Power Co. v. Town of Norwood*, Case 01-P-1467, slip op. at 6 n.6 (Mass. App. Ct. 2003).

[248] *New England Power Co. v. Town of Norwood*, 799 N.E.2d 594 (Mass. 2003), *cert. denied*, 2004 U.S. LEXIS 3861 (2004).

111. Not including interest, the CTC as modified by this Initial Decision is calculated to be $16,925,796.[249] The dollar value components supporting this CTC calculation are provided as an aid to the Commission and have been drawn from the record evidence. This calculation demonstrates that the CTC as modified by this Initial Decision is well below the revised CTC cap of $25,403,742 proposed by Staff and adopted by the undersigned Presiding Judge.

SUMMARY AND CONCLUSION

Procedural History

112. The Parties have an extensive litigation history; accordingly, only those dates which were most helpful in understanding the context of the instant proceeding have been summarized again here.

113. In December 1996 and October 1997, NEP made several filings with the Commission to: (a) allow restructuring of operations; (b) revise its wholesale power sales Tariff; (c) sell its non-nuclear generating facilities; (d) release its affiliates from their long-term requirements contracts with NEP (on payment of termination charges); and (e) in general, revise its rates so as to facilitate customer choice and market-based pricing, in accordance with the directives of the public utility commissions in its service areas.[250]

114. Over Norwood's objections, the Commission on February 25, 1998 approved: (a) NEP's restructured rates, as well as a freeze on the rates that NEP charged wholesale customers such as Norwood; and (b) the divestiture of NEP's

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[249] *See supra*, Issue 2 Discussion (discussing the CTC calculation given the holdings regarding the M factor and R factor).

[250] *See Town of Norwood v. FERC*, 202 F.3d 392, 396-97 (1st Cir. 2000), *cert. denied*, 531 U.S. 818; *Town of Norwood v. FERC*, 217 F.3d at 25-26.

non-nuclear generation. The U.S. Court of Appeals for the First Circuit upheld the Commission's orders.[251]

115. On March 4, 1998, Norwood notified NEP that it was terminating service under its service agreement with NEP, effective April 1, 1998, and would, on that date, begin taking service from Northeast Utilities Service Company (NU).[252]

116. On March 18, 1998, NEP filed an amendment to its FERC Tariff No. 1, permitting customers such as Norwood to terminate their contracts early, on only thirty days' notice (compared to seven years' notice), conditioned on the customers paying a contract termination charge (CTC). This proposed amendment offered Norwood the opportunity, previously unavailable, for Norwood to terminate service under the Tariff effective April 1, 1998. Norwood terminated its contract with NEP effective April 1, 1998, but it has never paid any portion of the CTC.

117. Over the objections of Norwood, in an order dated May 15, 1998, the Commission "accepted for filing, without suspension or hearing" NEP's March 18, 1998, amendment to their FERC Tariff No. 1.[253] On August 5, 1998, the Commission denied Norwood's request for rehearing of the May 15, 1998 order.[254] On December 23, 2002, Norwood filed a complaint with the Commission against National Grid,[255] et

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[251] *Town of Norwood v. FERC*, 202 F.3d 392.

[252] Ex. NOR-5. On April 22, 1998, the Commission accepted the Norwood-NU contract. *See* "Letter Order," Docket No. ER98-2301-000 (issued April 22, 1998) (accepting NU Operating Companies' Rate Schedule 348 *et al.*).

[253] New England Power Co., 83 FERC ¶ 61,174 (1998).

[254] New England Power Co., 84 FERC ¶ 61,175 (1998).

[255] National Grid Group plc acquired New England Electric System ("NEES"), the parent company of the New England Power Company ("NEP"), in 2000, and NEP was then renamed National Grid USA Service Company, Inc. *See* Ex. NEP-1 at 2:5-9.

al., attacking the CTC as unjust and unreasonable, unduly discriminatory, and preferential or otherwise unlawful under the Federal Power Act.[256] On January 1, 2003, National Grid filed an answer and motion to dismiss.[257] On July 2, 2003, the Commission "granted in part and denied in part" National Grid's motion to dismiss and set for hearing certain of Norwood's claims about the components of the CTC calculation.[258] In the July 2 Order, the Commission stated that it had accepted NEP's CTC formula, but that it had not accepted or approved the individual components of the calculation of Norwood's CTC.[259] The Commission set claims relating to the calculation of certain CTC components for hearing, stating that Norwood has the burden of proof on each claim.[260]

The CTC Formula

118. Under the CTC formula in Tariff No. 1,[261] the CTC payable by a customer who elects to terminate service before the expiration of its contract is determined by applying the following formula:

CTC = -M) x L

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[256] "Complaint of Town of Norwood, Massachusetts, Against National Grid USA For Imposing Unjust And Unreasonable Charges," Docket No. EL03-37-000 (filed on Dec. 23, 2002).

[257] "Answer to Complaint and Motion to Dismiss," Docket No. EL03-37-000 (filed on Jan. 30, 2003).

[258] Town of Norwood, 104 FERC ¶ 61,030 at P 18 and Ordering Paragraph A (2003) ("July 2 Order").

[259] *Id.* at P 18.

[260] *Id.*

[261] NEP witness Schwennesen's testimony provides a general overview of the CTC formula and then discusses in detail how these components were calculated for Norwood. *See* Ex. NEP-1.

where "R" is the customer's Average Annual Revenue, "M" is the Estimated Market Value of the customer's released capacity, and "L" is the Length of Obligation in years.[262]

119. With regard to the "L" component of the CTC, Norwood sought a declaratory order from the Commission that its July 25, 1990 letter did not extend the term of its contract with NEP to October 31, 2008 (the contract expiration date that NEP uses in its calculation of the CTC). The Commission denied Norwood's petition.[263] The U.S. Court of Appeals for the First Circuit upheld the Commission's decision, expressly finding that the 1990 letter exercised the option in writing and extended the contract, and thus extended Norwood's obligation to purchase electric energy from NEP to October 31, 2008.[264]

120. The "R" factor or Average Annual Revenue basically reflects the revenues that NEP is receiving from the customer at the time the customer terminates service, under rates approved by the Commission, reduced by transmission-related revenues. Accordingly, the R factor itself comprises two components: Total Revenue minus the Transmission Revenue.

121. The Total Revenue component of the R factor is the annual average amount of revenues received by NEP from the terminating customer over the three-year period immediately prior to the early termination date under rates approved by the Commission for Tariff No. 1 wholesale requirements service. However, where, *as here*, the rates paid by the customer under the Tariff have changed during that three-year period, Total Revenue is the revenue received from the customer during the twelve months immediately prior to the early

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[262] *Id.* at 6:22 – 7:7.

[263] Town of Norwood, 87 FERC ¶ 61,341 (1999), *reh'g denied*, 88 FERC 61,187 (1999).

[264] *Town of Norwood v. FERC*, 217 F.3d 24, 27-30 (1st Cir. 2000).

termination date.[265] Thus, for purposes of this proceeding, The Total Revenue component of the R factor is based on the revenues that NEP received from Norwood during the relevant one-year period under the applicable wholesale requirements rates under Tariff No. 1."[266] The applicable rates are a "snapshot" of the most recently Commission-approved rate for the customer at the time of termination.[267]

122. The Transmission Revenue component of the R factor is "the sum of two components (both calculated over the same period as Total Revenue)."[268] The first component is: either the annual average of revenues NEP credited to the customer for payments made by the customer to third parties for transmission service under the terms of the service agreement between NEP and the customer, or, if the service agreement does not provide for such credits, the annual average of revenues NEP would have received from the customer using the rates then in effect under NEP's open access transmission tariff.[269] Here, the service agreement does provide for such credits, thus, the first component is the annual average of revenues NEP credited to the customer for payments made by the customer to third parties for transmission service under the terms of the service agreement between NEP and Norwood. The second component is the annual average of payments made by NEP to the New England Power Pool ("NEPOOL") for transmission service on the customer's behalf under NEPOOL's Open Access Transmission Tafiff.[270]

123. The "M" factor, or Estimated Market Value, represents the market value of the power that NEP is supplying to the

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[265] Ex. NEP-1 at 7:10-22.

[266] *Id.* at 8:2-4.

[267] *Id.* at 8:10-12.

[268] *Id.* at 8:14-15.

[269] *Id.* at 8:15-21.

[270] *Id.* at 8:21 – 9:2.

customer at the time of the early termination of Tariff No. 1 service. Under the CTC formula, M itself is the product of several components. M equals the annual average of the Market Price Estimate for each year of the Length of Obligation multiplied by the customer's Released Load.[271]

124. The M factor's component Market Price Estimate represents the estimated market value of each kilowatt hour of electricity NEP is supplying to the customer, estimated as of the Early Termination Date. The CTC formula includes a table of kilowatt hour prices to be used in this calculation for the years 1998 through 2007, and provides that prices for 2008 and thereafter will be the prices for 2007 escalated at two percent annually.[272]

125. The other M factor component, the customer's Released Load, is "the annual average of the customer's kilowatt-hour purchased from NEP for the period over which Total Revenue is determined[,]"[273] which is either three years or twelve months, as discussed above.

126. The L factor in the CTC formula is the time difference between the end of the contract term when it is terminated prematurely and what the end of the contract term would have been had there been no early termination.[274]

The Market Price Estimate component of the M factor
(Issue 1)

127. As previously explained, the CTC Formula in NEP's Tariff reduces a terminating customer's CTC by the estimated market value of the electric capacity and energy NEP was selling to the customer at the time of termination. This credit

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[271] *Id.* at 9:15-19.

[272] *Id.* at 9:21 – 10:4.

[273] *Id.* at 13:1-2.

[274] *Id.* at 13:12-15.

to the customer's CTC obligation, the Estimated Market Value component of the CTC formula (the "M" factor in the formula), equals the product of (i) the customer's load over the twelve months prior to termination (the customer's "Released Load") and (ii) the Market Price Estimate specified in Section B(2)(a) of the CTC Formula for each remaining year in the term of the customer's contract. There is no dispute that, as corrected,[275] NEP appropriately determined Norwood's "Released Load" for purposes of calculating the Estimated Market Value credit set forth in the Tariff's CTC Formula for the years 1998 through 2008, the period which the Commission has determined to be the minimum remaining term of Norwood's contract obligation to purchase its power requirements from NEP.[276]

128. Norwood raises a number of arguments attacking the Market Price Estimate component of the M factor of the CTC. These arguments have been addressed under Issue 1 of this Initial Decision and have been found to be without merit, except with regard to the argument, also raised by Staff, that NEP's reliance on a market price forecast prepared by an independent third party (the "POLARIS" forecast) was inappropriate.[277] However, for the reasons discussed more fully herein above, it is the determination of the undersigned Presiding Judge that Norwood and Staff have failed to establish

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[275] Although NEP initially made an error in calculating Norwood's Released Load, that error was corrected. Ex. NEP-1 at 31; Ex. NEP-6.

[276] Town of Norwood, 87 FERC ¶ 61,341 (1999) *reh'g denied without op.*, 88 FERC ¶ 61,187 (1999), *aff'd*, 217 F.3d 24 (1st Cir. 2000), *cert. denied*, 532 U.S. 993 (2001).

[277] Ex. NEP-1 at 9-10; Ex. NEP-2 at Schedule II-C, 3-4. NEP based the Market Price Estimate component of the CTC Formula on a projection of energy and capacity prices in New England filed by Public Service of New Hampshire ("PS"), an affiliate of Northeast Utilities ("NU"), in a proceeding before the New Hampshire Public Service Commission in November 1997. Ex. NEP-1 at 10-11; Ex. NEP-3.

that the POLARIS forecast Market Price Estimates adopted by NEP renders the Market Price Estimate in the CTC Formula unjust and unreasonable under the facts of this case.

129. Norwood's contention that NEP's Market Price Estimate is unreasonable when compared to three other proposed benchmarks is not persuasive. Out of the nineteen forecasts presented in Ex. NEP-21,[278] the only forecasts that project prices materially above Norwood witness Wilson's preferred USGen forecast are two of the forecasts that one analyst inferred from the prices paid by purchasers of generating assets from Boston Edison Company and Central Maine Power Company.[279] However, NEP is correct in its contention that the technique he used to infer the market price expectations of generation buyers is suspect and therefore unreliable.[280] The forecast used by NEP, however, was within the range of other forecasts.[281] Moreover, the market prices in NEP's forecast were very close to, but slightly higher than: (a) the prices in NU's power supply offer to Norwood, which became the prices in the contract that Norwood signed to replace the power it had been buying from NEP; (b) the prices in another power supply offer that Norwood received (from LG&E Marketing);[282] and (c) the prices in Norwood's offer to continue to buy power from NEP.[283] The reasonableness of the CTC Formula's Market Price Estimate is

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[278] A copy of this chart has been provided as "Attachment A" to this Initial Decision as an aid to the Commission.

[279] Ex. NEP-21; Ex. NEP-24.

[280] Ex. NEP-28 at 26-31.

[281] Ex. NEP-21.

[282] Ex. NEP-10 at 22-23.

[283] Ex. NEP-43. NEP's projected market prices were slightly above the prices in each of these other offers, resulting in a larger Estimated Market Value credit and a lower CTC.

supported by the closeness of those projected prices to the prices in the contemporaneous Norwood/NU contract.

130. In the event that the Commission rejects the POLARIS forecast as a basis for the CTC Formula's Market Price Estimate, it is the determination of the undersigned Presiding Judge that the Norwood/NU replacement contract would provide the best evidence of Market Price Estimates under the facts of this case.[284] The replacement contract provides an accurate measure of the competitive market value of the subject capacity and energy prices, and it is contemporaneous with Norwood's decision to unilaterally terminate its energy supply contract with NEP.[285] However, because the prices in the Norwood/NU contract are slightly below NEP's Market Price Estimates, the credit that Norwood received against its CTC obligation is greater and results in an overall lower CTC for Norwood using the POLARIS forecast prices. Given that Norwood's replacement contract provides the best evidence of Market Price Estimates under the facts of this case, but that the prices in the Norwood/NU contract produce a higher CTC than the Market Price Estimate resulting from use of the POLARIS forecast, it is reasonable to conclude that the Market Price Estimate used to calculate Norwood's CTC has not been shown to be unjust or unreasonable.

Total Revenue component of the R factor (Issue 2)

131. Norwood raises a number of arguments attacking the Total Revenue component of the R factor of the CTC.[286]

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[284] As an aid to the Commission, a chart of supporting calculations is attached as "Attachment B" to this Initial Decision. The calculations compare the Total Estimated Market Value, or M factor, using the POLARIS forecasts for the Market Price Estimate (in Column G) versus the Norwood/NU replacement contract price values for the Market Price Estimate (in Column I).

[285] Ex. NEP-10 at 8-9, 19-20.

[286] Norwood notes that Issues 3 and 4 address two other issues that

These arguments have been addressed under Issue 2 of this Initial Decision and have been found to be without merit, except with regard to the argument that the Total Revenue component is unjust and unreasonable because it fails to reflect a 28% reduction in the annual W-95 revenues based upon NEP's divestiture of certain assets, which the Commission approved on February 25, 1998.[287] Staff agrees with Norwood that the Total Revenue component should be adjusted to reflect divestiture sales that were known and measurable at the time. Staff IB at 23, citing Ex. NEP-27 at 37:27 – 38:1.

132. After fully considering the evidence of record, the arguments of the parties and Staff as set forth in their initial and reply briefs, and the totality of the circumstances existing at the time of NEP's CTC filing, it is the determination of the undersigned Presiding Judge that the Total Revenue component of the R factor should be adjusted to reflect the divestiture of NEP's non-nuclear assets.[288] Staff raises legitimate concerns regarding the justness and reasonableness of including the non-nuclear assets in the revenue stream through the contract termination period of October 2008 when NEP had already contracted to divest those assets at the time that it filed the CTC.[289] Further, NEP's affiliates' settlements discount these assets by reducing the W-95 rate by 28%; this fact supports the conclusion that failure to reflect this known

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affect the R factor, i.e. the allegedly excessive rate of return and NEP's alleged failure to eliminate all transmission costs. Norwood IB at 11 n. 8.

[287] Norwood RB at 9, *citing* Ex. NOR-11 at 2-3 (Affidavit of NEP witness Schwennesen describing effect of divestiture on CTC for affiliates); New England Power Co., 82 FERC ¶ 61,179 (1998).

[288] Incorporating the adjustment to the Total Revenue calculation, the R factor is $141,314,711. The M value, using NEP's proposed Market Price Estimate, is $124,388,915. Accordingly, the R-M value is $16,925,796. Interest is not included in these calculations.

[289] *See, e.g.*, Staff RB at 13 – 17.

and measurable divestiture of assets in the calculation of the Total Revenue component of the R factor would be unduly discriminatory as to Norwood. However, as previously discussed, NEP's nuclear assets are not subject to this same inclusion because the divesture of these assets have not been shown to have been known and measurable at the time that NEP made its CTC filing.

133. While the Total Revenue component of the R factor should have been adjusted to reflect divestiture sales that were known and measurable at the time, NEP otherwise properly calculated the Total Revenue component using the actual revenues that it received from Norwood during the twelve months preceding the contract termination.[290]

Rate of Return in the CTC (Issue 3)

134. Norwood submits that the CTC's rate of return is excessive. Staff agrees that NEP's rate of return is excessive, and that it is therefore unjust and unreasonable. Norwood and Staff have not persuasively met their burden to show why the rate of return should be modified. The undersigned Presiding Judge has noted elsewhere in this Initial Decision that the "actual revenues" used by NEP are just, reasonable, and not unduly discriminatory once they are adjusted downwards 28% to account for the divestiture.[291] This finding will reduce the overall rate of return that NEP will receive from the CTC

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[290] *See* Ex. NEP-1 at 19:12 – 20:8. NEP notes that it made a calculation error by submitting estimated values of its revenues for February and March 1998 instead of actual values. This use was permitted because actual values were not knownat the time, but the CTC requires NEP to replace these values with actual values within six months after the termination of the contract. NEP did not do so at the time. However, it has corrected the value prospectively, and this correction has not affected any actual amounts paid because Norwood has not yet paid the CTC charge. The W-95 rate was the product of a settlement approved on September 14, 1995, which was within three years of the contract.

[291] *See supra*, Issue 2 Discussion.

that it charges NEP. However, Norwood and Staff have not presented any independent basis under the heading of this issue to cause the undersigned Presiding Judge to make additional adjustments to the overall rate of return that NEP earns from the CTC.

Transmission Revenue component of the R factor (Issue 4)

135. The CTC reduces the revenues by a credit that accounts for the portion of revenues NEP received from the customer attributable to transmission costs. The credit has two components; however, only one is at issue here.[292] The credit reduces NEP's Total Revenues under the R factor of the CTC from the customer by either: (1) the annual amount of any transmission credit in NEP 's service agreement with the customer; or (2) if the service agreement does not provide for such a credit, the revenues NEP would have received from the customer under its open access transmission tariff ("OATT").[293] NEP applied the first of these alternatives because the Norwood-NEP contract provided for a specific transmission credit to compensate Norwood for the amounts that it paid to Boston Edison Company ("BECO").[294] Staff witnesses testified that NEP accurately captured the offset for transmission revenues because Norwood was a transmission customer of BECO, not NEP.[295] Norwood paid BECO for the transmission and received a credit from NEP for that purchase. Thus, NEP's foregone transmission-related revenues from the Norwood contract do not reflect their own trans-

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[292] Norwood does not challenge the component of Transmission Revenue that reduces NEP's Total Revenues from Norwood by the amounts that NEP paid annually to NEPOOL for transmission service on behalf of Norwood. NEP IB at 14.

[293] NEP IB at 14, *citing* Ex. NEP-1 at 8-9; Ex. NEP-2 at Schedule II-C at Original Page No. 3.

[294] NEP IB at 14, *citing* Ex. NEP-1 at 26-27; Ex. NEP-6.

[295] Staff IB at 27, *citing* Ex. S-1 at 15:16-22; Ex. S-3 at 15:7-8.

mission costs. Rather, the foregone revenues reflect the credit. For the reasons discussed supra in Issue 4, NEP's methodology for determining the Transmission Revenue component is just, reasonable and not unduly discriminatory. Norwood has not met its burden of proof to demonstrate otherwise.

Challenges to the CTC CAP (Issue 5)

136. As previously explained, recovery under the CTC is limited under the Tariff by a cap ("the CTC cap") which provides that:

> [T]he difference between "R" and "M" cannot exceed the departing customer's annual contribution to NEP's fixed power supply costs under the Tariff, at the time of termination. That annual contribution is in turn defined in the Tariff as the difference between the departing customer's Total Revenue minus Transmission Revenue —which define the R factor applicable to the customer—reduced by NEP's Average Fuel Costs with respect to the customer. NEP's Average Fuel Costs are the annual average of revenues NEP receives for its cost of fuel multiplied by the customer's monthly kilowatt-hour purchases during the period over which Total Revenue is determined. . . . [T]his determination is made on a one-time "snapshot" basis, at the time of termination.[296]

137. Thus, because the departing customer's annual contribution to NEP's fixed power supply costs under the Tariff is defined as the difference between Total Revenue minus Transmission Revenue, the first component of the CTC cap is the same as the R factor of the CTC. Therefore, the holding that the Total Revenue component of the R factor should be adjusted to reflect the divestiture of NEP's non-nuclear assets is also relevant to the calculation of the first component of the CTC cap.

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[296] Ex. NEP-1 at 13:17 – 14:5.

138. Turning then, to the second component of the CTC cap regarding the calculation of NEP's fixed power supply costs; for the reasons discussed more fully under Issue 5 supra, the record supports a finding that the CTC cap as proposed is unjust and unreasonable because the formula inappropriately includes certain variable costs as fixed costs and is internally inconsistent. There is an inconsistency between the CTC formula and the stranded costs obligation formula after which it was modeled which "countenances the possibility that the CTC maximum cost recovery would include more than fixed power supply costs." *Id.* This inconsistency limits the usefulness of arguments that the CTC formula is modeled after the stranded costs obligation formula and that therefore the requirements of stranded cost principles should apply here. Further, as the undersigned Presiding Judge has emphasized elsewhere in this Initial Decision, stranded costs obligation principles are not controlling in determining the justness and reasonableness of the CTC or the CTC cap formulas.[297]

139. The findings that NEP has overstated fixed power supply costs in the manners discussed above support the adoption of the revised CTC cap recommended by Staff. Staff has revised the CTC cap it proposed to $25,403,742.[298] Consistent with

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[297] Town of Norwood, 104 FERC ¶ 61,030 at P 21 (2003), citing New England Power Co., 83 FERC ¶ 61,174 at 61,273, *reh'g denied*, 84 FERC ¶ 61,175 (1998); *Town of Norwood v. FERC*, 202 F.3d 392, 398-399 (D.C. Cir. 2000).

[298] Ex. S-12. NEP has pointed out the inconsistencies in Staff's first calculation of the CTC cap. However, NEP possesses custody and control of the records necessary to clarify which costs fall into which category. Therefore, NEP has the burden of production to clear up inconsistencies that it has pointed out regarding Staff's initial calculations. NEP has had the opportunity during this case to clear up any inconsistencies that may have resulted from a hastily filed CTC and should therefore be held responsible for the consequences of the CTC cap provision. Further, NEP should not be allowed to dispute the credibility of the revised calculations, which are based upon new information provided by NEP. This holding

the holding of this Initial Decision, this calculation accounts for the divestiture of non-nuclear assets in September 1998 but not for the later divestiture of nuclear assets.[299]

140. Finally, although interest is not a component of the CTC formula, Norwood attempts to argue yet again that it should not have to pay the 18% interest that the CTC filing entitles NEP to charge. The undersigned Presiding Judge concurs with NEP that the issue has already been litigated. As the Massachusetts Appeals Court noted in its unpublished decision:[300]

> We have also considered Norwood's arguments with respect to mitigation of damages and the inclusion of an improper interest rate in the calculation and conclude that they lack merit.[301]

141. The Massachusetts Appeals Court finding is undisturbed, given that the Supreme Court of Massachusetts denied review of the opinion and the U.S. Supreme Court recently denied the petition for writ of certiorart.[302] The interest rate is not a component of the CTC formula and was not identified by the Commission as an issue for hearing in this case. Therefore, the undersigned Presiding Judge rejects Nor-

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does not disturb that Commission's directive that the party challenging the CTC holds the burden of proof. Town of Norwood, 104 FERC ¶ 61,030 at P 18 (2003). Rather, it ensures that the CTC that NEP charges Norwood is just, reasonable and not unduly discriminatory.

[299] Staff IB at 29-30; Staff RB at 24-25.

[300] For the Commission's convenience, a copy of that opinion has been appended as Attachment C.

[301] *New England Power Co. v. Town of Norwood*, Case 01-P-1467, slip op. at 6 (Mass. App. Ct. 2003), *further appellate review denied*, 799 N.E.2d 594 (Mass. 2003), *cert. denied*, 2004 U.S. LEXIS 3861 (2004).

[302] *New England Power Co. v. Town of Norwood*, 799 N.e.2d 594 (Mass. 2003), *cert. denied*, 2004 U.S. LEXIS 3861 (2004).

wood's attack on the interest issue as *res judicata* and outside the scope of this proceeding.

142. Not including interest, the CTC as modified by this Initial Decision is calculated to be $16,925,796.[303] The dollar value components supporting this CTC calculation are provided as an aid to the Commission and have been drawn from the record evidence. This calculation demonstrates that the CTC as modified by this Initial Decision is well below the revised CTC cap of $25,403,742 proposed by Staff and adopted by the undersigned Presiding Judge. Interest on the monies Norwood owes NEP, but has refused to pay, ensures that Norwood will not be unfairly advantaged by the economic benefits it has derived from its unilateral termination of its long term energy supply contract with NEP to the economic disadvantage of the ratepayers of NEP's other customers. Further, interest on the monies Norwood owes NEP, but has refused to pay, ensures that Norwood will not be rewarded for its disregard of Commission precedent and process and the ensuing years of litigation.

IT IS ORDERED, subject to review by the Commission on exceptions or on its own motion, as provided by the Commission's Rules of Practice and Procedure, that within thirty days of the issuance of the Final Order in this proceeding, all parties shall take appropriate action to implement all the rulings in this decision. All arguments made by the participants, which have not been discussed and/or adopted by this decision have been considered and are rejected.

Bobbie J. McCartney
Presiding Administrative Law Judge

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[303] *See supra*, Issue 2 Discussion (discussing the CTC calculation given the holdings regarding the M factor and R factor).

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE FIRST CIRCUIT

Nos. 06-1658, 06-2054

TOWN OF NORWOOD, MASSACHUSETTS,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

NEW ENGLAND POWER COMPANY,
Intervenor.

Entered: February 2, 2007

JUDGMENT

This cause came on to be heard on petitions for review of orders of the Federal Energy Regulatory Commission and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The Federal Energy Regulatory Commission's order is affirmed insofar as it determines the amount of principal due. As to interest, the order is also affirmed insofar as it requires interest payments based on at least the prime rate--the figure the Town of Norwood itself seeks--and the matter is remanded only as to whether more is properly due. This court's stay order of August 21, 2006, will terminate when the mandate issues. Each party will bear its own costs in this court.

By the Court:

/s/ Richard Cushing Donovan
Richard Cushing Donovan, Clerk

[Certified copy to Federal Energy Regulatory Commission. Copies to Mr. Jablon, Ms. Lippman, Ms. Davison, Ms. Nadel, Mr. Fogelman, Mr. Todd, Mr. Wheatley, Mr. Barra, Mr. Carroll, Mr. Jaffe, Ms. Roman Salas, Mr. Kaufman, Mr. Frank, Mr. Solomon, Mr. McCartney.]

APPENDIX D

FPA, SECTION 201. DECLARATION OF POLICY; APPLICATION OF PART; DEFINITIONS

PART II—REGULATION OF ELECTRIC UTILITY COMPANIES ENGAGED IN INTERSTATE COMMERCE

Declaration of Policy; Application of Part; Definitions

Section 201. (a) It is hereby declared that the business of transmitting and selling electric energy for ultimate distribution to the public is affected with a public interest, and that Federal regulation of matters relating to generation to the extent provided in this Part and the Part next following and of that part of such business which consists of the transmission of electric energy in interstate commerce and the sale of such energy at wholesale in interstate commerce is necessary in the public interest, such Federal regulation, however, to extend only to those matters which are not subject to regulation by the States.

(b)(1) The provisions of this Part shall apply to the transmission of electric energy in interstate commerce and to the sale of electric energy at wholesale in interstate commerce, but except as provided in paragraph (2) shall not apply to any other sale of electric energy or deprive a State or State commission of its lawful authority now exercised over the exportation of hydroelectric energy which is transmitted across a State line. The Commission shall have jurisdiction over all facilities for such transmission or sale of electric energy, but shall not have jurisdiction, except as specifically provided in this Part and the Part next following, over facilities used for the generation of electric energy or over facilities used in local distribution or only for the transmission of electric energy in intrastate commerce, or over facilities for the transmission of electric energy consumed wholly by the transmitter.

(2) Notwithstanding section 201(f), the provisions of sections 203(a)(2), 206(e), 210, 211, 211A, 212, 215, 216, 217, 218, 219, 220, 221, and 222 shall apply to the entities described in such provisions, and such entities shall be subject to the jurisdiction of the Commission for purposes of carrying out such provisions and for purposes of applying the enforcement authorities of this Act with respect to such provisions. Compliance with any order or rule of the Commission under the provisions of section 203(a)(2), 206(e), 210, 211, 211A, 212, 215, 216, 217, 218, 219, 220, 221, or 222, shall not make an electric utility or other entity subject to the jurisdiction of the Commission for any purposes other than the purposes specified in the preceding sentence.

(c) For the purpose of this Part, electric energy shall be held to be transmitted in interstate commerce if transmitted from a State and consumed at any point outside thereof; but only insofar as such transmission takes place within the United States.

(d) The term "sale of electric energy at wholesale" when used in his Part means a sale of electric energy to any person for resale.

(e) The term "public utility" when used in this Part or in the Part next following means any person who owns or operates facilities subject to the jurisdiction of the Commission under this Part (other than facilities subject to such jurisdiction solely by reason of section 206(e), 206(f), 210, 211, 211A, 212, 215, 216, 217, 218, 219, 220, 221, or 222).

(f) No provision in this Part shall apply to, or be deemed to include, the United States, a State or any political subdivision of a state, an electric cooperative that receives financing under the Rural Electrification Act of 1936 (7 U.S.C. 901 et seq.) or that sells less than 4,000,000 megawatt hours of electricity per year, or any agency, authority, or instrumentality of any one or more of the foregoing, or any corporation which is

wholly owned, directly or indirectly, by any one or more of the foregoing, or any officer, agent, employee of any of the foregoing acting as such in the course of his official duty, unless such provision makes specific reference thereto.

(g) Books and Records.—(1) Upon written order of a State commission, a State commission may examine the books, accounts, memoranda, contracts, and records of—

(A) an electric utility company subject to its regulatory authority under State law,

(B) any exempt wholesale generator selling energy at wholesale to such electric utility, and

(C) any electric utility company, or holding company thereof, which is an associate company or affiliate of an exempt wholesale generator which sells electric energy to an electric utility company referred to in subparagraph (A), wherever located, if such examination is required for the effective discharge of the State commission's regulatory responsibilities affecting the provision of electric service.

(2) Where a State commission issues an order pursuant to paragraph (1), the State commission shall not publicly disclose trade secrets or sensitive commercial information.

(3) Any United States district court located in the State in which the State commission referred to in paragraph (1) is located shall have jurisdiction to enforce compliance with this subsection.

(4) Nothing in this section shall—

(A) preempt applicable State law concerning the provision of records and other information; or

(B) in any way limit rights to obtain records and other information under Federal law, contracts, or otherwise.

(5) As used in this subsection the terms "affiliate", "associate company", "electric utility company", "holding company", "subsidiary company", and "exempt wholesale generator" shall have the same meaning as when used in the Public Utility Holding Company Act of 2005.

FPA, SEC. 205. RATES AND CHARGES; SCHEDULES; SUSPENSION OF NEW RATES

Rates and Charges; Schedules; Suspension of New Rates

Sec. 205. (a) All rates and charges made, demanded, or received by any public utility for or in connection with the transmission or sale of electric energy subject to the jurisdiction of the Commission, and all rules and regulations affecting or pertaining to such rates or charges shall be just and reasonable, and any such rate or charge that is not just and reasonable is hereby declared to be unlawful.

(b) No public utility shall, with respect to any transmission or sale subject to the jurisdiction of the Commission, (1) make or grant any undue preference or advantage to any person or subject any person to any undue prejudice or disadvantage, or (2) maintain any unreasonable difference in rates, charges, service, facilities, or in any other respect, either as between localities or as between classes of service.

(c) Under such rules and regulations as the Commission may prescribe, every public utility shall file with the Commission, within such time and in such form as the Commission may designate, and shall keep open in convenient form and place for public inspection schedules showing all rates and charges for any transmission or sale subject to the jurisdiction of the Commission, and the classification, practices, and regulations affecting such rates and charges, together with all contracts which in any manner affect or relate to such rates, charges, classifications, and services.

(d) Unless the Commission otherwise orders, no change shall be made by any public utility in any such rates, charges, classification, or service, or in any rule, regulation, or contract relating thereto, except after sixty days' notice to the Commission and to the public. Such notice shall be given by

filing with the Commission and keeping open for public inspection new schedules stating plainly the change or changes to be made in the schedule or schedules then in force and the time when the change or changes will go into effect. The Commission, for good cause shown, may allow changes to take effect without requiring the sixty days' notice herein provided for by an order specifying the changes so to be made and the time when they shall take effect and the manner in which they shall be filed and published.

(e) Whenever any such new schedule is filed the Commission shall have authority, either upon complaint or upon its own initiative without complaint at once, and, if it so orders, without answer or formal pleading by the public utility, but upon reasonable notice to enter upon a hearing concerning the lawfulness of such rate, charge, classification, or service; and, pending such hearing and the decision thereon the Commission, upon filing with such schedules and delivering to the public utility affected thereby a statement in writing of its reasons for such suspension, may suspend the operation of such schedule and defer the use of such rate, charge, classification, or service, but not for a longer period than five months beyond the time when it would otherwise go into effect; and after full hearings, either completed before or after the rate, charge, classification, or service goes into effect, the Commission may make such orders with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made at the expiration of such five months, the proposed change of rate, charge, classification, or service shall go into effect at the end of such period, but in case of a proposed increased rate or charge, the Commisison may by order require the interested public utility or public utilities to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require such

public utility or public utilities to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a rate or charge sought to be increased, the burden of proof to show that the increased rate or charge is just and reasonable shall be upon the public utility, and the Commission shall give to the hearing and decision of such questions preference over other questions pending before it and decide the same as speedily as possible.

(f)(1) Not later than 2 years after the date of the enactment of this subsection and not less often than every 4 years thereafter, the Commission shall make a thorough review of automatic adjustment clauses in public utility rate schedules to examine—

(A) whether or not each such clause effectively provides incentives for efficient use of resources (including economical purchase and use of fuel and electric energy), and

(B) whether any such clause reflects any costs other than costs which are—

(i) subject to periodic fluctuations and

(ii) not susceptible to precise determinations in rate cases prior to the time such costs are incurred.

Such review may take place in individual rate proceedings or in generic or other separate proceedings applicable to one or more utilities.

(2) Not less frequently than every 2 years, in rate proceedings or in generic or other separate proceedings, the Commission shall review, with respect to each public utility, practices under any automatic adjustment clauses of such utility to insure efficient use of resources (including economical purchase and use of fuel and electric energy) under such clauses.

(3) The Commission may, on its own motion or upon complaint, after an opportunity for an evidentiary hearing, order a public utility to—

(A) modify the terms and provisions of any automatic adjustment clause, or

(B) cease any practice in connection with the clause, if such clause or practice does not result in the economical purchase and use of fuel, electric energy, or other items, the cost of which is included in any rate schedule under an automatic adjustment clause.

(4) As used in this subsection, the term "automatic adjustment clause" means a provision of a rate schedule which provides for increases or decreases (or both), without prior hearing, in rates reflecting increases or decreases (or both) in costs incurred by an electric utility. Such term does not include any rate which takes effect subject to refund and subject to a later determination of the appropriate amount of such rate.

FPA, SEC. 206. FIXING RATES AND CHARGES; DETERMINATION OF COST OF PRODUCTION OR TRANSPORTATION

Fixing Rates and Charges; Determination of Cost of Production or Transportation

Sec. 206. (a) Whenever the Commission, after a hearing held upon its own motion or upon complaint, shall find that any rate, charges, or classification, demanded, observed, charged, or collected by any public utility for any transmission or sale subject to the jurisdiction of the Commission, or that any rule, regulation, practice, or contract affecting such rate, charge, or classification is unjust, unreasonable, unduly discriminatory or preferential, the Commission shall determine the just and reasonable rate, charge, classification, rule, regulation, practice, or contract to be therafter observed and in force, and shall fix the same by order. Any complaint or motion of the Commission to initiate a proceeding under this section shall state the change or changes to be made in the rate, charge, classification, rule, regulation, practice, or contract then in force, and the reasons for any proposed change or changes therein. If, after review of any motion or complaint and answer, the Commission shall decide to hold a hearing, it shall fix by order the time and place of such hearing and shall specify the issues to be adjudicated.

(b) Whenever the Commission institutes a proceeding under this section, the Commission shall establish a refund effective date. In the case of a proceeding instituted on complaint, the refund effective date shall not be earlier than the date of the filing of such complaint nor later than 5 months after the filing of such complaint. In the case of a proceeding instituted by the Commission on its own motion, the refund effective date shall not be earlier than the date of the publication by the Commission of notice of its intention

to initiate such proceeding nor later than 5 months after the publication date. Upon institution of a proceeding under this section, the Commission shall give to the decision of such proceeding the same preference as provided under section 205 of this Act and otherwise act as speedily as possible. If no final decision is rendered by the conclusion of the 180-day period commencing upon initiation of a proceeding pursuant to this section, the Commission shall state the reasons why it has failed to do so and shall state its best estimate as to when it reasonably expects to make such decision. In any proceeding under this section, the burden of proof to show that any rate, charge, classification, rule, regulation, practice, or contract is unjust, unreasonable, unduly discriminatory, or preferential shall be upon the Commission or the complainant. At the conclusion of any proceeding under this section, the Commission may order refunds of any amounts paid, for the period subsequent to the refund effective date through a date fifteen months after such refund effective date, in excess of those which would have been paid under the just and reasonable rate, charge, classification, rule, regulation, practice, or contract which the Commission orders to be thereafter observed and in force: Provided, That if the proceeding is not concluded within fifteen months after the refund effective date and if the Commission determines at the conclusion of the proceeding that the proceeding was not resolved within the fifteen-month period primarily because of dilatory behavior by the public utility, the Commission may order refunds of any or all amounts paid for the period subsequent to the refund effective date and prior to the conclusion of the proceeding. The refunds shall be made, with interest, to those persons who have paid those rates or charges which are the subject of the proceeding.

(c) Notwithstanding subsection (b), in a proceeding commenced under this section involving two or more electric utility companies of a registered holding company, refunds which might otherwise be payable under subsection (b) shall

not be ordered to the extent that such refunds would result from any portion of a Commission order that (1) requires a decrease in system production or transmission costs to be paid by one or more of such electric companies; and (2) is based upon a determination that the amount of such decrease should be paid through an increase in the costs to be paid by other electric utility companies of such registered holding company: Provided, That refunds, in whole or in part, may be ordered by the Commission if it determines that the registered holding company would not experience any reduction in revenues which results from an inability of an electric utility company of the holding company to recover such increase in costs for the period between the refund effective date and the effective date of the Commission's order. For purposes of this subsection, the terms "electric utility companies" and "registered holding company" shall have the same meanings as provided in the Public Utility Holding Company Act of 1935, as amended.

(d) The Commission upon its own motion, or upon the request of any State commission whenever it can do so without prejudice to the efficient and proper conduct of its affairs, may investigate and determine the cost of the production or transmission of electric energy by means of facilities under the jurisdiction of the Commission in cases where the Commission has no authority to establish a rate governing the sale of such energy.

(e)(1) In this subsection:

(A) The term 'short-term sale' means an agreement for the sale of electric energy at wholesale in interstate commerce that is for a period of 31 days or less (excluding monthly contracts subject to automatic renewal).

(B) The term 'applicable Commission rule' means a Commission rule applicable to sales at wholesale by

public utilities that the Commission determines after notice and comment should also be applicable to entities subject to this subsection.

(2) If an entity described in section 201(f) voluntarily makes a short-term sale of electric energy through an organized market in which the rates for the sale are established by Commission-approved tariff (rather than by contract) and the sale violates the terms of the tariff or applicable Commission rules in effect at the time of the sale, the entity shall be subject to the refund authority of the Commission under this section with respect to the violation.

(3) This section shall not apply to—

(A) any entity that sells in total (including affiliates of the entity) less than 8,000,000 megawatt hours of electricity per year; or

(B) an electric cooperative.

(4)(A) The Commission shall have refund authority under paragraph (2) with respect to a voluntary short term sale of electric energy by the Bonneville Power Administration only if the sale is at an unjust and unreasonable rate.

(B) The Commission may order a refund under subparagraph (A) only for short-term sales made by the Bonneville Power Administration at rates that are higher than the highest just and reasonable rate charged by any other entity for a short-term sale of electric energy in the same geographic market for the same, or most nearly comparable, period as the sale by the Bonneville Power Administration.

(C) In the case of any Federal power marketing agency or the Tennessee Valley Authority, the Commission shall not assert or exercise any regulatory authority or power under paragraph (2) other than the ordering of refunds to achieve a just and reasonable rate.

FPA, SEC. 309. ADMINISTRATIVE POWERS OF COMMISSION; RULES, REGULATIONS, AND ORDERS

Sec. 309. The Commission shall have power to perform any and all acts, and to prescribe, issue, make, amend, and rescind such orders, rules, and regulations as it may find necessary or appropriate to carry out the provisions of this Act. Among other things, such rules and regulations may define accounting, technical, and trade terms used in this Act; and may prescribe the form or forms of all statements, declarations, applications, and reports to be filed with the Commission, the information which they shall contain, and the time within which they shall be filed. Unless a different date is specified therein, rules and regulations of the Commission shall be effective thirty days after publication in the manner which the Commission shall prescribe. Orders of the Commission shall be effective on the date and in the manner which the Commission shall prescribe. For the purposes of its rules and regulations, the Commission may classify persons and matters within its jurisdiction and prescribe different requirements for different classes of persons or matters. All rules and regulations of the Commission shall be filed with its secretary and shall be kept open in convenient form for public inspection and examination during reasonable business hours.

FPA, SEC. 313. REHEARINGS; COURT REVIEW OF ORDERS

Sec. 313. (a) Any person, electric utility, State, municipality, or State commission aggrieved by an order issued by the Commission in a proceeding under this Act to which such person, electric utility, State, municipality, or State commission is a party may apply for a rehearing within thirty days after the issuance of such order. The application for rehearing shall set forth specifically the ground or grounds upon which such application is based. Upon such application the Commission shall have power to grant or deny rehearing or to abrogate or modify its order without further hearing. Unless the Commission acts upon the application for rehearing within thirty days after it is filed, such application may be deemed to have been denied. No proceeding to review any orders of the Commission shall be brought by any entity unless such entity shall have made application to the Commission for a rehearing thereon. Until the record in a proceeding shall have been filed in a court of appeals, as provided in subsection (b), the Commission may at any time, upon reasonable notice and in such manner as it shall deem proper, modify or set aside, in whole or in part, any finding or order made or issued by it under the provisions of this Act.

(b) Any party to a proceeding under this Act aggrieved by an order issued by the Commission in such proceeding may obtain a review of such order in the Circuit Court of Appeals of the United States for any circuit wherein the licensee or public utility to which the order relates is located or has its principal place of business, or in the United States Court of Appeals for the District of Columbia, by filing in such court, within sixty days after the order of the Commission upon the application for rehearing, a written petition praying that the order of the Commission be modified or set aside in whole or in part. A copy of such petition shall forthwith be transmitted

by the clerk of the court to any member of the Commission and thereupon the Commission shall file with the court the record upon which the order complained of was entered, as provided in section 2112 of title 28, United States Code. Upon the filing of such petition such court shall have jurisdiction, which upon the filing of the record with it shall be exclusive, to affirm, modify, or set aside the order in whole or in part. No objection to the order of the Commission shall be considered by the court unless such objection shall have been urged before the Commission in the application for rehearing unless there is reasonable ground for failure so to do. The finding of the Commission as to the facts, if supported by substantial evidence, shall be conclusive. If any party shall apply to the court for leave to adduce additional evidence, and shall show to the satisfaction of the court that such additional evidence is material and that there were reasonable grounds for failure to adduce such evidence in the proceedings before the Commission, the court may order such additional evidence to be taken before the Commission and to be adduced upon the hearing in such manner and upon such terms and conditions as to the court may seem proper. The Commission may modify its findings as to the facts by reason of additional evidence so taken, and it shall file with the court such modified or new findings which, if supported by substantial evidence, shall be conclusive, and its recommendation, if any, for the modification or setting aside of the original order. The judgment and decree of the court, affirming, modifying, or setting aside, in whole or in part, any such order of the Commission, shall be final, subject to review by the Supreme Court of the United States upon certiorari or certification as provided in sections 239 and 240 of the Judicial Code, as amended (U.S.C., title 28, secs. 346 and 347).

(c) The filing of an application for rehearing under subsection (a) shall not, unless specifically ordered by the Commission, operate as a stay of the Commission's order. The

commencement of proceedings under subsection (b) of this section shall not, unless specifically ordered by the court, operate as a stay of the Commission's order.

5 U.S.C. Sec. 706

TITLE 5—GOVERNMENT ORGANIZATION AND EMPLOYEES

PART I—THE AGENCIES GENERALLY

CHAPTER 7—JUDICIAL REVIEW

Sec. 706. Scope of review

To the extent necessary to decision and when presented, the reviewing court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning or applicability of the terms of an agency action. The reviewing court shall—

(1) compel agency action unlawfully withheld or unreasonably delayed; and

(2) hold unlawful and set aside agency action, findings, and conclusions found to be—

(A) arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law;

(B) contrary to constitutional right, power, privilege, or immunity;

(C) in excess of statutory jurisdiction, authority, or limitations, or short of statutory right;

(D) without observance of procedure required by law;

(E) unsupported by substantial evidence in a case subject to sections 556 and 557 of this title or otherwise reviewed on the record of an agency hearing provided by statute; or

(F) unwarranted by the facts to the extent that the facts are subject to trial de novo by the reviewing court.

In making the foregoing determinations, the court shall review the whole record or those parts of it cited by a party, and due account shall be taken of the rule of prejudicial error.

28 USC Sec. 1254

TITLE 28—JUDICIARY AND JUDICIAL PROCEDURE

PART IV—JURISDICTION AND VENUE

CHAPTER 81—SUPREME COURT

Sec. 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

APPENDIX E

UNITED STATES COURT OF APPEALS
FIRST CIRCUIT

Nos. 98–1847, 98–1876, 98–2072,
98–2198, 98–2199.

TOWN OF NORWOOD, MASSACHUSETTS,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

NORTHEAST CENTER FOR SOCIAL ISSUES STUDIES,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,
Respondent.

Heard Oct. 5, 1999
Decided Feb. 2, 2000

Before BOUDIN, STAHL and LIPEZ, *Circuit Judges*.

BOUDIN, *Circuit Judge*.

In this case, the Town of Norwood, Massachusetts ("Norwood") and the Northeast Center for Social Issue Studies ("Northeast Center") seek review of a series of orders of the Federal Energy Regulatory Commission ("FERC") directed inter alia to New England Power Company ("New England Power"), which engages in interstate wholesale electric power distribution in New England. In a companion decision, *Town of Norwood v. New England Power Company*, 202 F.3d 408

(1st Cir. 2000), we decide today a separate appeal by Norwood from the dismissal of an antitrust and breach of contract suit that it brought in the district court against New England Power and others.

I. *THE HISTORY*

Our history of this case is drawn primarily from the administrative record. For many years New England Power served as one of the major wholesalers of electric power in New England. It operates a high voltage transmission network, and in the past has owned and operated a number of generating plants, including hydroelectric, fossil, and nuclear. New England Power is a subsidiary of New England Electric System, which also owns four "retail" distribution companies, including Massachusetts Electric Company ("Mass Electric") serving Massachusetts, and Narragansett Electric Company ("Narragansett") serving Rhode Island.

New England Power sells wholesale power that it generates or buys from others both to affiliates like Mass Electric and to non-affiliated wholesale customers like Norwood, which operates its own municipal electric system serving businesses and residents in the Town of Norwood, Massachusetts. In general, wholesale sales in interstate commerce are subject to regulation by FERC under the Federal Power Act, 16 U.S.C. §§ 791a–828c, *see* 16 U.S.C. § 824(a), while retail rates (*e.g.*, those charged by Mass Electric to its business and residential customers) are subject to state regulation, *e.g.*, Mass. Gen. Laws ch. 164, §§ 93–94E; *see also Boston Edison Co. v. City of Boston*, 390 Mass. 772, 459 N.E.2d 1231, 1233 (1984).

Traditionally, at both the federal and state level, electricity sales have been regulated on the familiar public utility model: the rates have been set forth in filed tariffs, unreasonable or unduly discriminatory rates have been forbidden, and an administrative agency has been charged with overseeing rates and other related subjects (such as extension of lines, mer-

gers, and the like). *See generally Town of Concord v. Boston Edison Co.*, 915 F.2d 17, 20 (1990), *cert. denied*, 499 U.S. 931, 111 S.Ct. 1337, 113 L.Ed.2d 268 (1991). In many cases, as with New England Power, the suppliers are vertically integrated and are engaged in electricity generation, intercity transmission, and local distribution. *See id.* at 19.

As with other, once fully regulated industries, legislators and regulators have over the last 25 years sought to introduce a greater measure of competition into the electric power industry. In the case of electric power, this has been achieved not by encouraging duplication of intercity transmission or local distribution networks—as is occurring in the telephone industry—but primarily by regulatory changes. These include imposing obligations on facilities' owners to carry power for other suppliers ("wheeling"), encouraging customers to choose among competing suppliers, and discouraging anti-competitive practices by a variety of means, including re-structuring so as to reduce the incentives for anticompetitive behavior. *See generally* Energy Information Administration, U.S. Dep't of Energy, *The Changing Structure of the Electric Power Industry: Selected Issues*, 1998, DOE/EIA–0562(98) (1998). Both Massachusetts and Rhode Island have been seeking to foster retail competition in the supply of electricity.

To this end, in December 1996, New England Power filed with FERC proposed amendments to power sales agreements with Mass Electric and Narragansett. Prior to the filing, requirements contracts obligated New England Power to supply its affiliates with all of their needs for electric power; the wholesale rates were specified in tariff schedules and termination by either side required lengthy prior notice (*e.g.* seven years). The proposed amendments permitted the affiliates to terminate on short notice, but subject to paying as a termination charge a portion of the costs incurred by New England Power in preparing itself to meet their projected longer-term requirements.

FERC referred the new filings to an administrative law judge, *New England Power Co.*, 78 F.E.R.C. ¶ 61,080 (1997), under whose auspices settlement discussions occurred. *See New England Power Co.*, 80 F.E.R.C. ¶ 63,003 (1997). In May 1997, New England Power filed proposed settlement agreements, which again permitted early termination for its affiliates (subject to termination charges), and provided that after termination New England Power would provide Mass Electric and Narragansett (at their option) with new "wholesale standard offer rates" which are described below. The settlement also committed New England Power to file a plan with FERC, by October 1, 1997, to divest itself of most of its generation business. Both of these steps, more fully described below, were purportedly designed to foster competition.

On October 1, 1997, New England Power sought approval from FERC to sell practically all of its non-nuclear electrical generating plants to USGen New England, Inc. ("USGenNE"), a subsidiary of a major west coast public utility holding company ("PG & E"). The sale required FERC approval both for the sale of certain facilities and the transfer of hydroelectric licenses. 16 U.S.C. §§ 801, 824b. In connection with its proposed purchase of assets, USGenNE agreed to assume responsibility for providing wholesale standard offer service to Mass Electric and Narragansett, and New England Power proposed to implement a rate freeze that would prevent increases in rates for its remaining wholesale customers, including Norwood.

Since 1983, Norwood has purchased electricity at wholesale from New England Power and resold it to local businesses and residential customers. Its agreement with New England Power, as extended by Norwood, obligated Norwood to take its requirements from New England Power through October 31, 2008.[1] Regarding the wholesale standard offer

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[1] In April 1998, Norwood petitioned FERC for a declaratory order

rates proposed for New England Power affiliates as an unfair advantage to retail "competitors," Norwood notified New England Power on March 4, 1998, that it was switching to a different wholesale supplier. Norwood has now become a wholesale customer of Northeast Utilities, another major supplier of wholesale electricity in New England.

New England Power countered on March 18, 1998, by filing a proposed tariff revision that would permit its remaining wholesale customers to terminate their long-term requirements contracts on 30 days' notice. But the tariff purported to subject such customers to payment of a contract termination charge to permit New England Power to recover the revenues that it would have collected had the customers continued to pay the fixed tariff rate through the contract term, less the expected costs avoided by not providing service. New England Power subsequently billed Norwood for a portion of this termination charge but Norwood apparently has declined to pay.

In the proceedings before FERC, Norwood objected to each of the three measures proposed by New England Power: (1) its proposed settlement with its affiliates to terminate their requirements contracts and to provide them the option of wholesale standard offer rate service; (2) its proposed dives-

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determining that the contract was not in fact extended to October 2008 because, *inter alia*, New England Power did not file with FERC an amendment reflecting the extension. FERC denied the petition, *Town of Norwood*, 87 F.E.R.C. ¶ 61,341 (1999), but now urges us to avoid piecemeal litigation by dismissing or staying this appeal pending possible rehearing of the latest order. But there is little overlap between that order (regarding the expiration date of Norwood's contract) and the instant petitions (primarily concerning the lawfulness of the contract termination charge). And even if on rehearing FERC found in favor of Norwood, the termination charge controversy would remain a live issue, as to the period after Norwood stopped receiving electricity from New England Power (April 1, 1998) but before the requirements contract expired (October 31, 1998, according to Norwood's no-extension theory).

titure of generating facilities to USGenNE and the associated freeze on the wholesale rates New England Power charged to its unaffiliated wholesale customers; and (3) its March 1998 tariff amendments allowing unaffiliated wholesale customers like Norwood to terminate their requirements contracts on short notice but only on payment of a contract termination charge.

In a set of orders in these three proceedings issued between November 1997 and June 1998, FERC rejected virtually all of Norwood's requests for relief.[2] Among other things, FERC approved the settlement agreement; it approved the sale of non-nuclear generating facilities to USGenNE and the transfer of hydroelectric licenses to it; and it upheld New England Power's imposition of a contract termination charge on unaffiliated purchasers who sought to terminate their existing contracts prematurely. Norwood sought direct review in this court, 16 U.S.C. § 825l(b), and we have consolidated its appeals into the present case.

Separate petitions for review of the FERC orders were filed in this court by Northeast Center. Its petitions challenged the orders insofar as they approved the sale to USGenNE of New England Power's hydroelectric generating facilities and associated licenses. Northeast Center challenged these actions on the ground that FERC had violated the Federal Power Act by failing to consider whether the divestiture would reduce property tax revenues of adjacent communities, and that FERC had violated both that statute and environmental laws by failing to give adequate attention to the potential environmental impact of the transfers. This court consolidated these petitions for review with those of Norwood.

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[2] *New England Power Co.*, 83 F.E.R.C. ¶ 61,174 (1998), *reh'g denied*, 84 F.E.R.C. ¶ 61,175 (1998); *New England Power Co.*, 82 F.E.R.C. ¶ 61,179 (1998), *reh'g denied*, 83 F.E.R.C. ¶ 61,275 (1998); *New England Power Co.*, 81 F.E.R.C. ¶ 61,281 (1997), *reh'g denied*, 83 F.E.R.C. ¶ 61,265 (1998).

II. *DISCUSSION*

1. Norwood's main attack, but not its only one, is upon FERC's approval of the contract termination charge that the New England Power tariff amendment of March 18, 1998, imposes on unaffiliated wholesale customers; this charge, as already explained, applies to a requirements contract customer who chooses to end its purchases before the end of the contract term and without the required notice. The amendment provides the customer an option to terminate at short notice but sets a specific tariff-based price on early departure.

FERC is entitled to review tariff amendments governing wholesale power sales under a "just and reasonable" standard, 16 U.S.C. § 824d(a); and at least on the surface the amendment serves the Commission's goal of fostering competition by giving Norwood an option to enter immediately into competitive purchasing. But Norwood argues that FERC's action is unlawful for a number of independent reasons, which we next address.

First, Norwood says that the approval is inconsistent with the Commission's "stranded cost recovery" provisions adopted in FERC Order No. 888 and associated regulations.[3] Order No. 888 imposed on investor-owned power companies a general obligation to wheel power for customers, many of whom had previously bought their power from one trans-

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[3] Order No. 888, Promoting Wholesale Competition Through Open Access Non–Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, 61 Fed. Reg. 21540 (1996) (rule codified as revised at 18 C.F.R. pts. 35 & 385), *clarified*, 76 F.E.R.C. ¶ 61,009 (1996), 76 F.E.R.C. ¶ 61, 347 (1996) and 79 F.E.R.C. 61,182 (1997), *order on reh'g*, Order No. 888-A, 62 Fed.Reg. 12274 (1997), *order on reh'g*, Order No. 888-B, 81 F.E.R.C. ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998), *petitions for review pending sub nom. Transmission Access Policy Study Group v. FERC*, Nos. 97-1715, et al. (D.C.Cir. Mar. 30, 1998).

mission company—normally, an integrated supplier—but now wished to use that company merely to transport power bought from another company. The order conditioned this wheeling obligation on the customers contributing to the recovery of the so-called "stranded costs" of the transporting company.

Stranded costs were defined in detail by FERC formulas but the general concept was this: in providing "bundled" service (generation and transmission), power companies had made investments expecting to recover them from captive customers. The wheeling obligation imposed by Order No. 888 could permit such customers to reach cheaper power elsewhere; and in some cases this would leave the power companies with investments, especially in generation facilities, that could not be fully recovered in a competitive environment. Stranded cost recovery to protect reasonable *expectations* was FERC's quid pro quo for open access to competing electricity suppliers during this period of transition.

The stranded cost recovery for which the orders and regulations provided was framed as an obligation of those customers who had previously been power customers of the integrated supplier but now chose to use only its transmission system. *See* 18 C.F.R. § 35.26(b)(1), (c)(2) (1999). Norwood's first objection to the contract termination charge in this case is that although Norwood previously bought *power* from New England Power, it got its *transmission* service for such power from Boston Edison and does not intend to use New England Power transmission service in the future. Thus, says Norwood, it falls outside the scope of FERC's stranded cost regulation and the tariff is inconsistent with Order No. 888.

FERC concedes that its Order No. 888 regulations do not apply in this case. But, as FERC notes, there is a separate (although parallel) justification for stranded cost recovery in the present case: Norwood as a requirements-contract cus-

tomer of power furnished by New England Power is being afforded an option to switch immediately to a competing supplier, without the seven years' notice required by the contract. *New England Power Co.*, 83 F.E.R.C. ¶ 61,174, at 61,722–23 (1998). In short, there is a different reason for similar relief; and while Order No. 888 does not mandate the new tariff, neither does it forbid it. *See* Order No. 888, 61 Fed.Reg. at 21662 (reserving the possibility of stranded cost recovery in other situations).

Norwood also argues that Order No. 888 and FERC's regulations excluded from stranded cost recovery those cases where a requirements contract was entered into or extended after July 11, 1994. FERC's stated reason for this limitation was that on that date it first gave public notice of its stranded cost proposal; thereafter, for new contracts the supplier and purchaser could make their own arrangements for early termination, recovery, and the like. Order No. 888, 61 Fed. Reg. at 21641; *see also* 18 C.F.R. § 35.26(b)(7), (c)(1)(ii). Norwood says that while its original contract was made prior to July 11, 1994, New England Power and Norwood agreed to changes in the agreement after that date. But the restrictions in Order No. 888 are no more than conditions on stranded cost recovery *under that order* and do not preclude the Commission from allowing tariffs that permit somewhat similar recovery whenever a customer purports to disregard an existing contractual obligation.

Second, Norwood claims that the tariffed termination charge is nothing more than an effort to collect contract damages for early termination through the Commission's processes, and that this conflicts with FERC's practice of deferring to the courts on matters of contract and deprives Norwood of the chance to counter a contract breach claim by showing that New England Power breached the contract first. Admittedly, the stranded cost recovery in the tariff is closely akin to contract damages, and the Commission in the past has

declined to adjudicate some contract disputes. *E.g., Southern Cal. Edison Co.*, 85 F.E.R.C. ¶ 61,023 (1998).

But FERC's abstention in cases like *Southern California Edison* appears primarily to reflect an unwillingness to resolve disputes about the *meaning* of disputed contract provisions. Here, the Commission has not interpreted Norwood's contract with New England Power or determined whether Norwood has breached the contract or has been freed from the contract based on a breach by New England Power. *See New England Power Co.*, 84 F.E.R.C. ¶ 61,175, at 61,920 (1998). It has merely upheld, on a generic basis, a termination charge for those customers who are bound by existing contracts but wish to avoid their obligations.

Third, Norwood claims that FERC had to reject the New England Power tariff offering customers the termination option because it conflicts with the *Mobile-Sierra* doctrine and the filed rate doctrine. The former, developed in cases interpreting the Federal Power Act and the Natural Gas Act, *Federal Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348, 354–55, 76 S.Ct. 368, 100 L.Ed. 388 (1956); *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332, 344, 76 S.Ct. 373, 100 L.Ed. 373 (1956), prevents FERC from overriding a contract unless it finds that the contract is contrary to the public interest. *See Texaco, Inc. v. FERC*, 148 F.3d 1091, 1095–97 (D.C.Cir. 1998). The doctrine protects a party's interest in its contract (unless overridden by a public interest finding).

In a sense, the addition of the express option to terminate earlier (at a specified price) can be viewed as modifying the contract. But from Norwood's vantage, the option merely gives it something that it did not have before; it remained free to insist that New England Power continue to supply power under the contract until expiration. The termination charge is certainly a detriment but, absent a showing that its formula is any worse than contract damages, it merely spells out what

would have been the law's remedy if Norwood had no option but simply breached the existing contract.

The filed rate doctrine can—so far as relevant here—be regarded as a prohibition on retroactive increases for tariffed services. *See Arkansas La. Gas Co. v. Hall*, 453 U.S. 571, 577–78, 101 S.Ct. 2925, 69 L.Ed.2d 856 (1981). Formally, the filed rate doctrine says that the only lawful rate is that reflected in the tariff on file when the service is performed, *id.*, but the refusal to permit retroactive increases is taken as a corollary, *id.* at 578, 101 S.Ct. 2925.[4] Most regulatory statutes, but not all, *see Federal Power Comm'n v. Sunray DX Oil Co.*, 391 U.S. 9, 24, 88 S.Ct. 1526, 20 L.Ed.2d 388 (1968), permit reparations to the customer if the tariff rate is later shown to be unreasonably high, but the carrier can never collect more than the tariffed rate.

Norwood is not being asked to pay more for past purchases than provided for by the tariff in effect at the time of such purchases. The tariff change, as just noted, gives Norwood an option it did not have before to cancel *future* purchases on short notice by paying a termination charge—hardly a retroactive increase in charges for past purchases. Norwood says that the change is retroactive because it was imposed after Norwood had ceased to make purchases under FERC Tariff No. 1, Norwood having disclaimed its existing contract and signed on with a new supplier. But the change only governed Norwood as to its future purchases—or failures to purchase—

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[4] Although the doctrine originated as a bar to shipper efforts to pay something less than the tariff rate, *see, e.g., Texas & Pac. Ry. Co. v. Mugg & Dryden*, 202 U.S. 242, 26 S.Ct. 628, 50 L.Ed. 1011 (1906), it has evolved, *see, e.g., Keogh v. Chicago & N.W. Ry. Co.*, 260 U.S. 156, 43 S.Ct. 47, 67 L.Ed. 183 (1922), into a much broader limitation on civil lawsuits that have the effect of contradicting or undercutting a tariffed rate regulated by a federal agency, *see, e.g., Arkansas La. Gas*, 453 U.S. 571, 101 S.Ct. 2925, 69 L.Ed.2d 856. This latter development is considered in our companion decision.

from New England Power; there was no effort to increase rates for purchases made in the past, which is the pertinent concern of the filed rate doctrine.

Fourth, Norwood says that New England Power has failed to supply data to show that it is "just and reasonable" to require Norwood to pay a contract termination charge allegedly amounting to $78 million for the period from 1998 through 2008. Norwood derives this figure by projecting the termination charges from April 1, 1998, through the expiration of the extended contract which Norwood has now disavowed. The Federal Power Act requires just and reasonable rates, 16 U.S.C. § 824d(a), and the regulations for rate filings generally require the filing of cost of service data for new or increased rates, 18 C.F.R. §§ 35.12, 35.13.

But the termination charge is not a new or increased rate for supplying energy. It is a formula-driven charge to cover certain projected losses to New England Power caused by *not* supplying electricity after preparing to do so, calculated based on rates already approved by FERC. Thus the contract termination charge in no way represents a rate increase for Norwood.[5] If these charges were miscomputed or unsupported, Norwood might well have a legitimate objection; but it has not explained any such objection to us, let alone tried to support it with citations or figures.

Before FERC, Norwood primarily urged that the contract termination charge filing be rejected in its entirety. But in a

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[5] New England Power filed its proposed tariff amendment under FERC's abbreviated filing provision, 18 C.F.R. § 35.13, which exempts certain rate schedule changes from typical cost-of-service filing requirements. In particular, 18 C.F.R. § 35.13(a)(2)(iii) provides for abbreviated filing for "a rate schedule change that does not provide for a rate increase" in certain circumstances. FERC held that the filing was proper "because payment of the CTC will not result in a rate increase over the existing Tariff No. 1 rates." *New England Power Co.*, 84 F.E.R.C. ¶ 61,175, at 61,920 (1998).

footnote in its motion to intervene, and more fully in its motion for rehearing, Norwood also sought a hearing regarding the reasonableness of the amount that New England Power sought to recover—referring, *inter alia*, to alleged problems with the contract termination charge calculation. FERC denied the request for rehearing, concluding that no evidentiary hearing was necessary because no party had raised a disputed issue of material fact. *New England Power Co.*, 84 F.E.R.C. ¶ 61,175, at 61,920 (1998).

To whatever extent there was in fact a disputed issue regarding the termination charge calculation that necessitated a hearing, *cf. Louisiana Energy & Power Auth. v. FERC*, 141 F.3d 364, 371 (D.C.Cir.1998), Norwood does not identify it to us. FERC suggested in its initial order that Norwood could file a section 206 complaint, 16 U.S.C. § 824e, challenging the substance of the contract termination charge, *New England Power Co.*, 83 F.E.R.C. ¶ 61,174, at 61,724 (1998), and presumably it can still do so, *cf. OXY USA, Inc. v. FERC*, 64 F.3d 679, 690 (D.C.Cir.1995).

Fifth, Norwood's final set of objections to the termination charge are of a different character. In substance, Norwood complains that the termination charge imposed on it exceeds the charge imposed on affiliates of New England Power; that the so-called wholesale standard offer rate (available to the affiliates but not to Norwood) is unfairly low during the opening years and dangerously high thereafter; and that these discrepancies, and the threatened effects, require rejection of both the termination charge and the standard offer rates—or at least evidentiary hearings.

The Commission's answer regarding the contract termination charge—that the affiliates "settled" with New England Power, *New England Power Co.*, 83 F.E.R.C. ¶ 61,174, at 61,723 n. 13 (1998), *reh'g denied*, 84 F.E.R.C. ¶ 61,175, at 61,920 (1998)—would make the hairs stand up on the neck of an old-fashioned utility lawyer. The utility tradition, growing

out of hostility to preferences and rebates, has been to oppose unequal treatment or at least to treat it with great skepticism. Specifically, the Federal Power Act outlaws unjustifiably disparate treatment of similarly situated entities under the rubric of "undue preference." 16 U.S.C. § 824d(b).

But differential treatment does not necessarily amount to *undue* preference where the difference in treatment can be explained by some factor deemed acceptable by the regulators (and the courts). *E.g., Cities of Newark v. FERC*, 763 F.2d 533, 546 (3d Cir.1985). The District of Columbia Circuit, which reviews more such regulatory matters than any other court, has approved divergent treatment that stems from a settlement, reasoning that there is a public interest in settlements and that one party should not be able to frustrate a settlement for everyone else. *Cities of Bethany v. FERC*, 727 F.2d 1131, 1138–40 (D.C.Cir.), *cert. denied*, 469 U.S. 917, 105 S.Ct. 293, 83 L.Ed.2d 229 (1984); *United Mun. Distribs. Group v. FERC*, 732 F.2d 202, 212–13 (D.C.Cir.1984).

Norwood attacks this justification for differential treatment on the ground that it should not apply where the non-settling parties were denied an opportunity to attack the settlement in the administrative proceeding. However, even assuming that such a limitation exists (and perhaps it should), the Administrative Law Judge found that Norwood's request for a hearing on the settlement was out of time and unsupported, *New England Power Co.*, 80 F.E.R.C. ¶ 63,003, at 65,040–41 (1997), and Norwood offers no answer to this ruling.

Under these circumstances, we think that the mere disparity in Norwood's contract termination charge vis à vis that of other companies that settled is not a *per se* violation of the "undue preference" prohibition. Norwood passed up the opportunity to settle with New England Power regarding termination, *see New England Power Co.*, 83 F.E.R.C. 61,174, at 61,723 n. 13 (1998), and argued to FERC that the contract termination charge approved in the settlement proceeding was

too high. It seems to us that at least where a party has been offered the same settlement and refused it, a claim based simply on an abstract right to be treated the same as settling companies has much less force—and to recognize it would subvert the public interest in promoting settlements.[6] Whether an undue preference claim might be made based on competitive or other market impacts is a different issue, addressed below.

2. Norwood's more interesting claim of undue preference is directed not to the contract termination option and charge—Norwood's main target—but to the wholesale standard offer rates, which appears to have been offered only to affiliates of New England Power. These rates were not offered to Norwood; and although they were initially included in the FERC settlement, they do not appear to be a resolution of any existing legal obligation between New England Power and its affiliates. Their origin and justification are quite different.

The wholesale standard offer rates, it appears, are a schedule of wholesale power rates that begins at a rather low level and then climbs over a number of years to a rather high level.[7] It interlocks with schedules of *retail* standard offer

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[6] As it happens, New England Power does trouble in its brief to explain why it computed a different contract termination charge for Norwood. It says that in the settlement (the termination provisions of which it offered to Norwood) the formula was based on a theory that—unlike the charge in the latter tariff—involved projecting and allocating an overall loss to New England Power from the transition (with offsetting credits for benefits). Since the projection was based on disputable estimates, the company based its tariff on the more readily calculable figures relating to estimated purchases under the contract less estimated avoided costs.

[7] For example, the rate goes from 3.2 cents per kilowatt hour to 5.1 cents per kilowatt hour between 1998 and 2004. Norwood claims that the early-year prices are below-market, but whether that is so is unclear from the record.

rates that New England Power's affiliates have agreed, in settlements with their respective state commissions, to offer as a safeguard for retail customers who do not or cannot immediately take advantage of the competitive sources of retail supply that both federal and state regulators foresee developing. *See New England Power Co.*, 82 F.E.R.C. ¶ 61,179, at 61,664 (1998); *In re Massachusetts Elec. Co.*, Mass. D.P.U. 96–25, at 23–25 (Feb. 26, 1997). To the extent that customers take advantage of these initially favorable retail rates from the affiliates, the retailers themselves will have counterpart wholesale rates.

These "backup" standard offer rates are not intended as a permanent low-cost option. On the contrary, they increase sharply over a brief period partly in order to encourage customers to migrate into the competitive market once they have had time to negotiate with retailers who, because of wheeling obligations imposed at both the wholesale and retail level, will then be able to compete to supply once-captive customers. *See In re Massachusetts Elec. Co.*, Mass. D.P.U., at 23–25. But Norwood, being a municipal system, is not subject to these wheeling obligations and has no obligation to offer retail standard offer rates as a backup for its retail customers. See Mass. Gen. Laws ch. 164, § 47A.

Norwood says that the wholesale standard offer rates were denied to it and are below the market rate; it argues that FERC therefore should have held hearings to determine whether the rates were unduly discriminatory.[8] FERC ex-

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[8] Norwood did not clearly raise this issue before FERC when the standard offer rate was initially filed. In the settlement proceeding in which the standard offer rate was first accepted by FERC, Norwood primarily argued that the standard offer rates were too *high*—it worried that the prices would eventually apply to it as well. In its motion for rehearing, Norwood added the argument that the standard offer rates were below the then-applicable Tariff No. 1 rates. But by the time FERC decided the motion, Norwood had apparently repudiated its Tariff No. 1

plained the special rates by pointing to the New England Power affiliates' obligation to offer retail standard offer rates to their own customers and their consequent need for dovetailed wholesale standard offer rates from their supplier. *New England Power Co.*, 82 F.E.R.C. ¶ 61,179, at 61,664. Norwood was not similarly situated because it had no similar obligation. On the surface, this is a plausible explanation for differential treatment, at least in the absence of some plausible rejoinder from Norwood.

Norwood also complains that the wholesale standard offer rates were not justified by cost-of-service data. New England Power did not submit any because it contended that the initial standard offer rates did not amount to a rate increase and cost-of-service data was therefore not required by FERC regulations. 18 C.F.R. § 35.13(a)(iii). When USGenNE proposed to take over the standard offer service from New England Power, it did so as part of its application for "market-based rate" approval: FERC approved the petition in relevant part, concluding that USGenNE need not be limited to cost-of-service rates because it did not have market power in generation or transmission. *New England Power Co.*, 82 F.E.R.C. ¶ 61,179, at 61,662, 61,665. *See generally Louisiana Energy & Power Auth. v. FERC*, 141 F.3d 364, 365 (D.C.Cir. 1998). Norwood offers no response to these arguments.

3. This brings us to Norwood's final set of arguments, alleging that the FERC actions it attacks will have a series of anticompetitive *effects*. One action is the relatively high contract termination charge imposed on Norwood; the second is the provision to Mass Electric of the favorable wholesale

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contract with New England Power; FERC therefore determined that Norwood could no longer claim to be harmed by the rate differential. *New England Power Co.*, 83 F.E.R.C. ¶ 61,265, at 62,106 (1998). FERC did discuss the standard offer rates in the context of the divestiture proceeding, where the rate agreements were assumed by USGenNE. *See, e.g., New England Power Co.*, 82 F.E.R.C. ¶ 61,179, at 61,664.

standard offer rates. Taken together, says Norwood, these steps will have a variety of anticompetitive consequences and, at the very least, FERC should have conducted an evidentiary inquiry into this claim.

Conceivably, a difference in treatment otherwise justified might be less so if it had an anticompetitive impact, *see Cities of Bethany v. FERC*, 727 F.2d 1131, 1141 (D.C.Cir.), *cert. denied*, 469 U.S. 917, 105 S.Ct. 293, 83 L.Ed.2d 229 (1984), and the agency might be faulted if it declined even to inquire into a well-supported claim of this kind, c*f. Michigan Pub. Power Agency v. FERC*, 963 F.2d 1574, 1578–79 (D.C.Cir. 1992). In the agency and in this court, Norwood has alleged anticompetitive effects. But mere allegations of impact do not trigger an evidentiary hearing. To justify a hearing, the allegations must raise a genuine issue of material fact that cannot be adequately resolved on the written record. *Louisiana Energy & Power Auth. v. FERC*, 141 F.3d 364, 371 (D.C. Cir.1998).[9]

Here, Norwood appears to allege three different effects: that the initial wholesale standard offer rates are so low that they will discourage the development of *wholesale* competition in New England that might otherwise provide lower prices for Norwood, enabling it better to serve its customers and to compete with New England Power affiliates; that the denial of standard offer rates to Norwood in these early years, coupled with a high contract termination charge, will force

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[9] 18 C.F.R. § 2.17 provides special procedures for triggering a hearing where a wholesale customer makes a prima facie showing that price discrimination results in a "price squeeze" (in short, a combination of high wholesale prices and low retail prices that makes it impossible for a wholesale customer to compete with its supplier at the retail level). *See Cities of Bethany*, 727 F.2d at 1140-41 & n. 41. Although Norwood sometimes refers to the contested prices as a price squeeze, it does not here purport to have made the specific showing necessary to trigger 18 C.F.R. § 2.17.

Norwood's costs to a level well above those of New England Power's affiliates, again impairing Norwood's ability to compete with those affiliates; and that higher standard offer rates in later years will force up the general level of wholesale prices in New England, harming consumers and Norwood at the same time.

These assertions appear, with more or less detail, in the affidavits of two experts that Norwood submitted to FERC. They were countered in some measure by other expert testimony. While some of the assertions in Norwood's affidavits are doubtful at best, the Commission's orders offer only a relatively sketchy discussion of competitive impact. In sum, if Norwood had seriously briefed the issue, we *might* have a serious issue to decide.

Instead, Norwood's main brief offers us only a couple of conclusory statements coupled with references to its affidavits. Norwood makes little effort to explain the basis for its predictions, does not match them up with what the Commission said in its orders, and does not address obvious critical issues: *e.g.*, the actual extent of competition between Norwood and New England Power's affiliates, each of whom primarily serves separate retail areas; why new wholesale competition will not develop as the wholesale standard offer rates rise; and why imports of electricity will not constrain USGenNE.

Since Norwood has virtually abdicated its responsibility to brief the issue to us, FERC's own brief only touches on the competition issues; the New England Power brief, although more helpful, offers only brief comments on a few points. Thus, we have no coherent and developed argument in this court to address on the competition issue. In these circumstances, Norwood has forfeited its argument; developing a sustained argument out of economic materials and legal precedents is the job of the appellant, not the reviewing court, as we have previously warned. *U.S. Healthcare, Inc. v.*

Healthsource, Inc., 986 F.2d 589, 595–97 (1st Cir.1993); *see also Gamma Audio & Video, Inc. v. Ean–Chea*, 11 F.3d 1106, 1113 (1st Cir.1993).

Indeed, in an area this complicated, it is doubtful that we could do an adequate job on our own, although we might still try if a severe threat to the public interest appeared likely from the affidavits. But a negative long-term effect on power rates in New England is among the less plausible of the conjectures; and the short-term competitive impact on Norwood is something that it should have been able to explain and support in an appellate brief (if the materials were in the record) and it has not done so. Payment of a large termination charge, due in some measure to Norwood's own maneuvers, is not the same thing as demonstrated harm to competition.

4. Northeast Center describes itself as a non-profit corporation dedicated to "public education regarding environmental changes related to technology and energy uses." While Norwood is primarily concerned with rates and termination charges, Northeast Center's focus is on the transfer of generating facilities from New England Power to USGenNE and the related transfer of hydroelectric licenses.

Both of these steps required the Commission's approval under a broad "public interest" standard. 16 U.S.C. §§ 801, 824b(a); 18 C.F.R. § 9.3.[10] Northeast Center intervened in the administrative proceedings and asked the Commission to hold evidentiary hearings on two alleged possible effects of the transfers: harm to the environment and reduced property tax

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[10] FERC's order approving the divestiture did not purport to approve the sale of the hydropower projects as a whole, but only those facilities within FERC's jurisdiction by virtue of their use for transmission of electric energy in interstate commerce and/or for sale of electric energy at wholesale in interstate commerce. *See* 16 U.S.C. § 824(b)(1). Jurisdictional facilities mentioned by New England Power in its application included generating leads and step-up transformers.

revenues for towns that collected property taxes on the facilities. The Commission declined to do so or to prepare an environmental impact statement or assessment. New England Power Co., 82 F.E.R.C. ¶ 62,138, at 64,214–15 (1998), reh'g denied, 83 F.E.R.C. ¶ 61,272, at 62,132–34 (1998); New England Power Co., 82 F.E.R.C. ¶ 61,179, at 61,661 (1998), reh'g denied, 83 F.E.R.C. ¶ 61,275, at 62,148–49 (1998).

In this court, Northeast Center says that these failures were error. FERC counters that Northeast Center lacks Article III standing to pursue these issues in court. Article III standing is a threshold issue, *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 88-102, 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998). The burden to show standing is upon the litigant whose standing is challenged, *Benjamin v. Aroostook Med. Ctr., Inc.*, 57 F.3d 101, 104 (1st Cir.1995), and is not established merely because the agency permitted intervention, *City of Orrville v. FERC*, 147 F.3d 979, 985 (D.C.Cir.1998).

The pertinent ground rules for association standing are clear enough in the abstract: to pursue judicial review, an association or similar representative organization may have standing if at least one of its members has standing in his or her own right, the interests served by the suit are pertinent to the mission of the organization, and relief does not require the presence of the members in the suit. *United States v. AVX Corp.*, 962 F.2d 108, 116 (1st Cir.1992). An individual has standing if he can show that he is suffering or is threatened with injury in fact to a cognizable interest; that the injury is causally connected to the conduct complained of; and that the court is competent to afford relief that will or is likely to redress the injury. *Bennett v. Spear*, 520 U.S. 154, 162, 117 S.Ct. 1154, 137 L.Ed.2d 281 (1997).

We start with the claim of environmental injury. Northeast Center says that it is concerned with the environment, and its member directors live in Vermont and New Hampshire and use the Connecticut River and its tributaries for recreation.

The hydroelectric facilities being transferred are located in these states on the Connecticut River. And, it is alleged, the transfer from one licensee and owner (New England Power) to the other (USGenNE) could affect the management of the dams, primarily with regard to water releases and timing, in ways that affect recreational uses, erosion, flooding and water quality.

Thus, the issue of standing and "the merits" substantially overlap. FERC's public interest standard encompasses environmental concerns, *see Wisconsin v. FERC*, 104 F.3d 462, 470 (D.C.Cir.1997), and arguably a substantial threat from the transfer would require attention, *cf. Platte River Whooping Crane Critical Habitat Maintenance Trust v. FERC*, 876 F.2d 109 (D.C.Cir.1989); *Southern Cal. Edison Co.*, 49 F.E.R.C. ¶ 61,091 (1989). But if there is no credible threat, then the Northeast Center and its members lack standing, *Adams v. Watson*, 10 F.3d 915, 922-23 (1st Cir.1993), and, even if they had standing, FERC's refusal to pursue a speculative claim would not be error. *Northeast Utils. Serv. Co. v. FERC*, 993 F.2d 937, 958-59 (1st Cir.1993).

From either standpoint, the present case is not a close one. FERC was understandably skeptical of the environmental claim; building and operating a major new dam is likely to have environmental consequences, but the transfer of existing facilities from one large utility to another is simply a change in ownership, and USG-enNE became subject to the same license conditions and regulations that had bound New England Power. If there is anything in the history of USGenNE or its west coast parent that suggests that either would mismanage the facilities or disobey the conditions or regulations, Northeast Center has not mentioned it.

About all that Northeast Center has done is to refer in passing to a report by a joint state commission, which states that New England Power has done a superior job in managing river flows. But there is nothing to show or even suggest that

USG-enNE is likely to do a worse job in operating the same facilities or that any predictable variations in its performance are likely to have a significant effect on the environment. And this report, which is not di-rected specifically at USGenNE and, moreover, which Northeast Center hardly refers to in its briefs, is *all* that Northeast Center offers to support its claim of standing or its demand for a full-scale evidentiary investigation by FERC.

Even the more generous of the cases that uphold standing or require an environmental impact statement or assessment under the National Environmental Policy Act ("NEPA")[11] involved projects more likely to threaten harm or a more particularized showing that harm is threatened. *Cf. United States v. Students Challenging Regulatory Agency Procedures (SCRAP)*, 412 U.S. 669, 683–90, 93 S.Ct. 2405, 37 L.Ed.2d 254 (1973). FERC's own regulations, made in conformity with the governing regulations under NEPA,[12] categorically classify such transfers of ownership and licensing as the kind of projects not likely to have a significant environmental impact or to require a NEPA environmental im-

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[11] The National Environmental Policy Act ("NEPA"), 42 U.S.C. § 4321 *et seq.*, requires federal agencies to prepare a detailed environmental impact statement regarding any "major Federal actions significantly affecting the quality of the human environment." 42 U.S.C. § 4332(2)(C). Implementing regulations direct an agency to prepare a less detailed environmental assessment when the agency is uncertain whether an environmental impact statement is required for a given action. 40 C.F.R. § 1501.4 (1998).

[12] NEPA regulations direct agencies to identify categories of actions that normally do not require either environmental impact statements or environmental assessments because the agency has found that, as a class, they "do not individually or cumulatively have a significant effect on the human environment." 40 C.F.R. § 1508.4. FERC's categorical exclusions include, in relevant part, transfers of water power project licenses and approval of actions under section 203 of the Federal Power Act relating to acquisition or disposition of property. 18 C.F.R. § 380.4(a)(8), (16).

pact statement or smaller scale assessment. 18 C.F.R. § 380.4(a)(8), (16). If there was reason here for a different outcome, Northeast Center has not provided it.

A FERC action that otherwise falls within a categorical exclusion to the NEPA requirements may nonetheless warrant an environmental assessment or environmental impact statement if the action may affect, *inter alia*, wetlands, anadromous fish species, or a National Refuge, 18 C.F.R. § 380.4(b), all of which Northeast Center says are affected by the projects at issue. But the regulation only *requires* an assessment or impact statement if "circumstances indicate that an action may be a major Federal action significantly affecting the quality of the human environment." *Id.* As discussed above, Northeast Center has not presented any evidence indicating how the license and asset transfers (as opposed to the projects themselves) will have any impact on the environment.

Turning to economic impact, the nature of Northeast Center's claim is quite different. It asserts that competition in the supply of electric power is likely in some cases to impair the value of the existing utility plant, and it points to a Moody's investment survey to support that view. The actions taken in this case by the Commission are designed to foster competition. Ergo, says Northeast Center, the value of the transferred generating facilities may be reduced and the property taxes paid to local communities may decline. This, it says, should have been investigated.

It is sufficient to dispose of this case that Northeast Center has not shown that its own interests would be affected by such a decline in property taxes; and, even assuming that its members or directors might be so affected (based on residence), Northeast Center has not shown that its representational function extends to such private economic concerns. Germaneness of the interests served by a lawsuit to the purpose of the organization is a settled requirement for

standing based on membership, *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343, 97 S.Ct. 2434, 53 L.Ed.2d 383 (1977), "preventing litigious organizations from forcing the federal courts to resolve numerous issues as to which the organizations themselves enjoy little expertise and about which few of their members demonstrably care." *Humane Soc'y of the United States v. Hodel*, 840 F.2d 45, 57 (D.C.Cir.1988); *see also UAW v. Brock*, 477 U.S. 274, 106 S.Ct. 2523, 91 L.Ed.2d 228 (1986).

Accordingly, we need not reach the question whether a showing of likely economic impact, made by a person with standing, would compel FERC to pursue the matter, but we are entitled to express our doubts. It is true that the public interest concept is a broad one, but there are limits. Here, FERC has approved a set of transactions based on their effects in the electric power industry, its main responsibility and concern. It is far from clear that a policy aimed at securing lower-cost power for consumers through more competition would or should be curtailed even if it were shown to have some effect on plant value and local taxes in a few *communities. Cf. Northeast Utils. Serv. Co. v. FERC*, 993 F.2d 937, 951 (1st Cir. 1993).

It is worth adding that, to the extent such effects may be predicted from competition, the effects are primarily due to actions already taken by FERC in broader proceedings such as the one that led to Order No. 888. And while competition may well reduce the economic value of some existing plants, this case may be an exception: ironically, Northeast Center's exhibit suggests that the transferred facilities sold for more than their book value.

The petitions for review are denied.

APPENDIX F

Excerpts from Federal Statutes Containing Examples of "Just and Reasonable" Language

7 U.S.C. § 206
TITLE 7—AGRICULTURE
CHAPTER 9—PACKERS AND STOCKYARDS
SUBCHAPTER III—STOCKYARDS AND STOCKYARD DEALERS

Sec. 206. Rates and charges generally; discrimination

All rates or charges made for any stockyard services furnished at a stockyard by a stockyard owner or market agency shall be just, reasonable, and nondiscriminatory, and any unjust, unreasonable, or discriminatory rate or charge is prohibited and declared to be unlawful. . . .

7 U.S.C. § 208
TITLE 7—AGRICULTURE
CHAPTER 9—PACKERS AND STOCKYARDS
SUBCHAPTER III—STOCKYARDS AND STOCKYARD DEALERS

Sec. 208. Unreasonable or discriminatory practices generally; rights of stockyard owner of management and regulation

(a) It shall be the duty of every stockyard owner and market agency to establish, observe, and enforce just, reasonable, and nondiscriminatory regulations and practices in respect to the furnishing of stockyard services, and every unjust, unreasonable, or discriminatory regulation or practice is prohibited and declared to be unlawful.

(b) It shall be the responsibility and right of every stockyard owner to manage and regulate his stockyard in a just, reasonable, and nondiscriminatory manner. . .

7 U.S.C. § 211
TITLE 7—AGRICULTURE
CHAPTER 9—PACKERS AND STOCKYARDS
SUBCHAPTER III—STOCKYARDS AND STOCKYARD DEALERS

Sec. 211. Order of Secretary as to charges or practices; prescribing rates and practices generally

(a) May in accordance with the standard set forth in section 206 of this title determine and prescribe what will be the rate or charge, or rates or charges, to be thereafter in such case observed as the maximum or minimum or both to be charged, and what regulation or practice is or will be just, reasonable, and nondiscriminatory. . . .

15 U.S.C. § 3371
TITLE 15—COMMERCE AND TRADE
CHAPTER 60—NATURAL GAS POLICY
SUBCHAPTER III—ADDITIONAL AUTHORITIES AND REQUIREMENTS
Part B—Other Authorities and Requirements

Sec. 3371. Authorization of certain sales and transportation

(a)(1)(B) Just and reasonable rates

The rates and charges of any interstate pipeline with respect to any transportation authorized under subparagraph (A) shall be just and reasonable (within the meaning of the Natural Gas Act [15 U.S.C. 717 et seq.]).

16 U.S.C. § 831k
TITLE 16—CONSERVATION
CHAPTER 12A—TENNESSEE VALLEY AUTHORITY

Sec. 831k. Transmission lines; construction or lease; sale of power over other than Government lines; rates when sold for resale at profit

. . . That as to any surplus power not so sold as above provided to States, counties, municipalities, or other said

organizations, before the Board shall sell the same to any person or corporation engaged in the distribution and resale of electricity for profit, it shall require said person or corporation to agree that any resale of such electric power by said person or corporation shall be made to the ultimate consumer of such electric power at prices that shall not exceed a schedule fixed by the Board from time to time as reasonable, just, and fair; and in case of any such sale, if an amount is charged the ultimate consumer which is in excess of the price so deemed to be just, reasonable, and fair by the Board, the contract for such sale between the Board and such distributor of electricity shall be voidable at the election of the Board. . . .

25 U.S.C. § 443b
TITLE 25—INDIANS CHAPTER 14—MISCELLANEOUS
SUBCHAPTER I—GENERAL PROVISIONS

Sec. 443b. Indian goods and supplies

. . . shall be paid out of the moneys appropriated for such purpose only on the basis of such rate for the transportation of such Indian goods and supplies as the Secretary of the Interior shall deem just and reasonable under the provisions set forth herein. . . .

33 U.S.C. § 12
TITLE 33—NAVIGATION AND NAVIGABLE WATERS
CHAPTER 1—NAVIGABLE WATERS GENERALLY
SUBCHAPTER I—GENERAL PROVISIONS

Sec. 12. Port Arthur Ship Canal

. . . The charges for the use of said docks and wharves shall be just and reasonable and shall not be greater than charges for similar services at other ports of the United States on the Gulf of Mexico.

33 U.S.C. § 508

TITLE 33—NAVIGATION AND NAVIGABLE WATERS
CHAPTER 11—BRIDGES OVER NAVIGABLE WATERS
SUBCHAPTER I—GENERAL PROVISIONS

Sec. 508. Amount of tolls

Tolls for passage or transit over any bridge constructed under the authority of the Act of March 23, 1906 (34 Stat. 84; 33 U.S.C. 491-498), commonly known as the "Bridge Act of 1906", the General Bridge Act of 1946 [33 U.S.C. 525 et seq.], and the International Bridge Act of 1972 [33 U.S.C. 535 et seq.] shall be just and reasonable.

40 U.S.C. § 1309

TITLE 40—PUBLIC BUILDINGS, PROPERTY, AND WORKS
SUBTITLE I—FEDERAL PROPERTY AND ADMINISTRATIVE SERVICES
CHAPTER 13—PUBLIC PROPERTY

Sec. 1309. Preservation, sale, or collection of wrecked, abandoned, or derelict property

. . . A contract may provide compensation the Administrator considers just and reasonable to any person who gives information about the property or actually preserves, collects, surrenders, or pays over the property. . . .

42 U.S.C. § 2391

TITLE 42—THE PUBLIC HEALTH AND WELFARE
CHAPTER 24—DISPOSAL OF ATOMIC ENERGY COMMUNITIES
SUBCHAPTER VIII—LOCAL ASSISTANCE

Sec. 2391. Assistance to governmental entities

(a) Annual assistance payments; extensions; determination of amount and recipient

. . . the Administrator is authorized, for a period of ten years, to make annual assistance payments of just and reasonable sums to the State, county, or local entity having jurisdiction to collect property taxes or to the entity receiving the installation transferred hereunder: *Provided, however,* That with respect to the cities of Oak Ridge, Tennessee, and Richland, Washington, the Richland School District, the Los Alamos School Board, and the county of Los Alamos, New Mexico, the Administrator is authorized to continue to make assistance payments of just and reasonable sums after expiration of such ten-year period: *Provided further,* That the Administrator is also authorized to make payments of just and reasonable sums to Anderson County and Roane County, Tennessee. In determining the amount and recipient of such payments the Administrator shall consider . . .

42 U.S.C. § 2458b
TITLE 42—THE PUBLIC HEALTH AND WELFARE
CHAPTER 26—NATIONAL SPACE PROGRAM
SUBCHAPTER I—GENERAL PROVISIONS

Sec. 2458b. Insurance and indemnification

(d) Certification of just and reasonable amount

No payment may be made under subsection (b) of this section unless the Administrator or his designee certifies that the amount is just and reasonable.

47 U.S.C. § 160
TITLE 47—TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5—WIRE OR RADIO COMMUNICATION
SUBCHAPTER I—GENERAL PROVISIONS

Sec. 160. Competition in provision of telecommunications service

(a) Regulatory flexibility

Notwithstanding section 332(c)(1)(A) of this title, the Commission shall forbear from applying any regulation or any provision of this chapter to a telecommunications carrier or telecommunications service, or class of telecommunications carriers or telecommunications services, in any or some of its or their geographic markets, if the Commission determines that—

(1) enforcement of such regulation or provision is not necessary to ensure that the charges, practices, classifications, or regulations by, for, or in connection with that telecommunications carrier or telecommunications service are just and reasonable and are not unjustly or unreasonably discriminatory. . . .

47 U.S.C. § 201
TITLE 47—TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5—WIRE OR RADIO COMMUNICATION
SUBCHAPTER II—COMMON CARRIERS
Part I—Common Carrier Regulation

Sec. 201. Service and charges

(b) All charges, practices, classifications, and regulations for and in connection with such communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is declared to be unlawful: . . . .

47 U.S.C. § 202
TITLE 47—TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5—WIRE OR RADIO COMMUNICATION
SUBCHAPTER II—COMMON CARRIERS
Part I—Common Carrier Regulation

Sec. 202. Discriminations and preferences

(a) Charges, services, etc.

It shall be unlawful for any common carrier to make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service, directly or indirectly, by any means or device, or to make or give any undue or unreasonable preference or advantage to any particular person, class of persons, or locality, or to subject any particular person, class of persons, or locality to any undue or unreasonable prejudice or disadvantage.

47 U.S.C. § 204
TITLE 47—TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5—WIRE OR RADIO COMMUNICATION
SUBCHAPTER II—COMMON CARRIERS
Part I—Common Carrier Regulation

Sec. 204. Hearings on new charges; suspension pending hearing; refunds; duration of hearing; appeal of order concluding hearing

(a)(1) . . . At any hearing involving a new or revised charge, or a proposed new or revised charge, the burden of proof to show that the new or revised charge, or proposed charge, is just and reasonable shall be upon the carrier, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

47 U.S.C. § 205
TITLE 47—TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5—WIRE OR RADIO COMMUNICATION
SUBCHAPTER II—COMMON CARRIERS
Part I—Common Carrier Regulation

Sec. 205. Commission authorized to prescribe just and reasonable charges; penalties for violations

(a) . . . the Commission shall be of opinion that any charge, classification, regulation, or practice of any carrier or carriers is or will be in violation of any of the provisions of this chapter, the Commission is authorized and empowered to determine and prescribe what will be the just and reasonable charge or the maximum or minimum, or maximum and minimum, charge or charges to be thereafter observed, and what classification, regulation, or practice is or will be just, fair, and reasonable, to be thereafter followed. . . .

47 U.S.C. § 224
TITLE 47—TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5—WIRE OR RADIO COMMUNICATION
SUBCHAPTER II—COMMON CARRIERS
Part I—Common Carrier Regulation

Sec. 224. Pole attachments

(b) Authority of Commission to regulate rates, terms, and conditions; enforcement powers; promulgation of regulations

(1) Subject to the provisions of subsection (c) of this section, the Commission shall regulate the rates, terms, and conditions for pole attachments to provide that such rates, terms, and conditions are just and reasonable, and shall adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions. . . .

47 U.S.C. § 226
TITLE 47—TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5—WIRE OR RADIO COMMUNICATION
SUBCHAPTER II—COMMON CARRIERS
Part I—Common Carrier Regulation

Sec. 226. Telephone operator services

(h) Determinations of rate compliance

(2) Review of informational tariffs

If the rates and charges filed by any provider of operator services under paragraph (1) appear upon review by the Commission to be unjust or unreasonable, the Commission may require such provider of operator services to do either or both of the following:

(A) demonstrate that its rates and charges are just and reasonable, and . . . .

47 U.S.C. § 229
TITLE 47—TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5—WIRE OR RADIO COMMUNICATION
SUBCHAPTER II—COMMON CARRIERS
Part I—Common Carrier Regulation

Sec. 229. Communications Assistance for Law Enforcement Act compliance

(e) Cost recovery for Communications Assistance for Law Enforcement Act compliance

(2) Commission authority

. . . The Commission may, consistent with maintaining just and reasonable charges, practices, classifications, and regulations in connection with the provision of interstate or foreign communication by wire or radio by a common carrier, allow carriers to adjust such charges, practices, classifications, and regulations in order to carry out the purposes of this chapter.

47 U.S.C. § 251
TITLE 47—TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5—WIRE OR RADIO COMMUNICATION
SUBCHAPTER II—COMMON CARRIERS
Part II—Development of Competitive Markets

Sec. 251. Interconnection

(c) Additional obligations of incumbent local exchange carriers

(2) Interconnection

. . .

(D) on rates, terms, and conditions that are just, reasonable, and nondiscriminatory, in accordance with the terms and conditions of the agreement and the requirements of this section and section 252 of this title.

47 U.S.C. § 252
TITLE 47—TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5—WIRE OR RADIO COMMUNICATION
SUBCHAPTER II—COMMON CARRIERS
Part II—Development of Competitive Markets

Sec. 252. Procedures for negotiation, arbitration, and approval of agreements

(d) Pricing standards

(1) Interconnection and network element charges

Determinations by a State commission of the just and reasonable rate for the interconnection of facilities and equipment for purposes of subsection (c)(2) of section 251 of this title, and the just and reasonable rate for network elements for purposes of subsection (c)(3) of such section—. . . .

47 U.S.C. § 254
TITLE 47—TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5—WIRE OR RADIO COMMUNICATION
SUBCHAPTER II—COMMON CARRIERS
Part II—Development of Competitive Markets

Sec. 254. Universal service

(b) Universal service principles

(1) Quality and rates

Quality services should be available at just, reasonable, and affordable rates.

47 U.S.C. § 259
TITLE 47—TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5—WIRE OR RADIO COMMUNICATION
SUBCHAPTER II—COMMON CARRIERS
Part II—Development of Competitive Markets

Sec. 259. Infrastructure sharing

(b) Terms and conditions of regulations

. . .

(4) ensure that such local exchange carrier makes such infrastructure, technology, information, facilities, or functions available to a qualifying carrier on just and reasonable terms and conditions that permit such qualifying carrier to fully benefit from the economies of scale and scope of such local exchange carrier . . . .

47 U.S.C. § 271
TITLE 47—TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5—WIRE OR RADIO COMMUNICATION
SUBCHAPTER II—COMMON CARRIERS
Part III—Special Provisions Concerning Bell Operating Companies

Sec. 271. Bell operating company entry into interLATA services

(c) Requirements for providing certain in-region interLATA services

(1) Agreement or statement

(B) Failure to request access

(2) Specific interconnection requirements

(B) Competitive checklist

(iii) Nondiscriminatory access to the poles, ducts, conduits, and rights-of-way owned or controlled by the Bell operating company at just and reasonable rates in accordance with the requirements of section 224 of this title.

47 U.S.C. § 274
TITLE 47—TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5—WIRE OR RADIO COMMUNICATION
SUBCHAPTER II—COMMON CARRIERS
Part III—Special Provisions Concerning Bell Operating Companies

Sec. 274. Electronic publishing by Bell operating companies

(d) Bell operating company requirement

A Bell operating company under common ownership or control with a separated affiliate or electronic publishing joint venture shall provide network access and interconnections for basic telephone service to electronic publishers at just and reasonable rates that are tariffed (so long as rates for such services are subject to regulation) and that are not higher on a per-unit basis than those charged for such services to any other electronic publisher or any separated affiliate engaged in electronic publishing.

47 U.S.C. § 327
TITLE 47—TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5—WIRE OR RADIO COMMUNICATION
SUBCHAPTER III—SPECIAL PROVISIONS RELATING TO RADIO
Part I—General Provisions

Sec. 327. Naval stations; use for commercial messages; rates

The Secretary of the Navy is authorized, unless restrained by international agreement, under the terms and conditions and at rates prescribed by him, which rates shall be just and reasonable, and which, upon complaint, shall be subject to review and revision by the Commission. . . .

47 U.S.C. § 332
TITLE 47—TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5—WIRE OR RADIO COMMUNICATION
SUBCHAPTER III—SPECIAL PROVISIONS RELATING TO RADIO
Part I—General Provisions

Sec. 332. Mobile services

(c) Regulatory treatment of mobile services

(1) Common carrier treatment of commercial mobile services

(A) . . .

(i) enforcement of such provision is not necessary in order to ensure that the charges, practices, classifications, or regulations for or in connection with that service are just and reasonable and are not unjustly or unreasonably discriminatory; . . . .

47 U.S.C. § 573
TITLE 47—TELEGRAPHS, TELEPHONES, AND RADIOTELEGRAPHS
CHAPTER 5—WIRE OR RADIO COMMUNICATION
SUBCHAPTER V09A—CABLE COMMUNICATIONS
Part V—Video Programming Services Provided by Telephone Companies

Sec. 573. Establishment of open video systems

(b) Commission actions

(1) Regulations required

. . .

(A) except as required pursuant to section 531, 534, or 535 of this title, prohibit an operator of an open video system from discriminating among video programming providers with regard to carriage on its open video system, and ensure that the rates, terms, and conditions for such carriage are just and reasonable, and are not unjustly or unreasonably discriminatory;

* * * *

APPENDIX G

84 F.E.R.C. ¶ 61,175 (1998)

New England Power Company,
Docket No. ER98-2233-001

Order Denying Rehearing

(Issued August 5, 1998)

Before Commissioners: James J. Hoecker, Chairman; Vicky A. Bailey, William L. Massey, Linda Breathitt, and Curt Hébert, Jr.

The Town of Norwood, Massachusetts (Norwood) requests rehearing of the Commission order issued in this proceeding on May 15, 1998, *New England Power Company*, 83 FERC ¶ 61,174 (1998) (May 15 order). In the May 15 order, the Commission accepted a tariff amendment filed by New England Power Company (NEPCO) to permit its wholesale requirements customers the option of terminating service early, subject to the payment of a contract termination charge (CTC). As explained below, we will deny rehearing.

Background

The background of this case and related proceedings is discussed in detail in the May 15 order. Briefly, NEPCO provides wholesale requirements service under its FERC Electric Tariff, Original Volume No. 1 (Tariff No. 1), subject to a seven years' notice of termination provision set forth at Schedule I, Section N. In its proposed amendment, NEPCO proposed to modify Section N to permit a customer, at its election, to terminate service with less than seven years' notice, subject to the payment of a CTC.[1] NEPCO filed the

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[1] NEPCO stated in its transmittal letter that the amendment implemented a commitment it made as part of its application in Docket Nos.

proposed amendment to permit Norwood to terminate its existing Tariff No. 1 service effective April 1, 1998, consistent with Norwood's written notice to NEPCO, dated March 4, 1998. The option to terminate early upon payment of a CTC would also be available to NEPCO's other Tariff No. 1 customers.

In the May 15 order, we found that the option to buy-out and thus terminate service by payment of the proposed CTC would be supplemental to, and generally consistent with, the existing opportunity available to NEPCO's Tariff No. 1 customers who seek to modify and/or terminate their contracts.[2] We also found that the proposed formula for calculating the CTC would recover the revenues lost over the existing seven-year notice of termination term, less an estimate of the market value of the released capacity and energy, and that payment of the full demand charges over the remainder of the contract term would thus be avoided.[3] Accordingly, we accepted the proposed amendment for filing without suspension or hearing, to be effective March 31, 1998.

On rehearing, Norwood argues, in essence, that it need not pay the CTC because its service agreement expired prior to NEPCO's filing. Norwood also claims that the CTC is unduly discriminatory in favor of NEPCO's distribution company

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EC98-1-000 and ER98-6-000, wherein NEPCO, among other things, proposed to divest certain jurisdictional facilities as part of the sale of substantially all of its non-nuclear generating assets to USGen New England, Inc. This commitment was to offer its Tariff No. 1 customers an "open season" in which they could terminate their wholesale requirements service early, subject to the payment of a CTC. NEPCO's divestiture was approved by the Commission in *New England Power Company, Narragansett Electric Company, AllEnergy Marketing Company, L.L.C., and USGen New England, Inc.*, 82 FERC ¶ 61,179 , order on clarification and reh'g, 83 FERC ¶ 61,275 (1998).

[2] 83 FERC at p. 61,723

[3] *Id.*

affiliates who are also Tariff No. 1 customers;[4] that the amendment should not have been accepted for filing under the Commission's abbreviated filing requirements; that NEPCO, following its divestiture, is not a "public utility" under the Federal Power Act (FPA); that the CTC violates the filed rate doctrine and constitutes an unlawful award of contract damages; and that the CTC is not authorized under Section 212 of the FPA, 16 U.S.C. §824 k (1994).[5]

Discussion

We reject Norwood's position that the payment of the CTC is non-mandatory, as to Norwood. Norwood contends that its Tariff No. 1 service agreement expired prior to the date that the CTC amendment became effective and that Norwood is therefore not subject to the CTC. In support of this view, Norwood raises a number of issues which it is currently litigating in a state court proceeding.[6] These issues, however, stray well beyond the scope of this proceeding. As we stated

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[4] The Commission has previously approved negotiated agreements for the early termination of Tariff No. 1 service between NEPCO and its affiliates, *Massachusetts Electric Company and Narragansett Electric Company, in New England Power Company*, 81 FERC ¶ 61,281 (1997), *order denying reh'g*, 83 FERC ¶ 61,265 (1998), and NEPCO's affiliate, Granite State Electric Company, in *New England Power Company*, 83 FERC ¶ 61,085 (1998), *reh'g pending*.

[5] NEPCO filed a motion for leave to file an answer and answer to Norwood's rehearing request, and Norwood filed a reply to NEPCO's answer. Pursuant to Rule 213(a)(2) of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.213 (a)(2) (1998), NEPCO's motion is hereby denied and Norwood's reply is rejected.

[6] In brief, Norwood claims that NEPCO's voluntary divestiture of its non-nuclear generation facilities resulted in a violation of a Decree and Order issued by United States District Court for the District of Massachusetts on April 12, 1993, a breach of contract under Norwood's service agreement with NEPCO, and a violation of federal antitrust statutes. *Town of Norwood v. New England Power Co., et al.*, No. 907-10818-PBS (D. Mass. filed April 14, 1997).

in the May 15 order, "[t]he fact that Norwood is litigating in court the issue of whether NEPCO's voluntary divestiture of its non-nuclear generation facilities constituted a breach of contract on NEPCO's part [that, according to Norwood, authorized it to terminate its service agreement] does not affect NEPCO's right to seek from this Commission an early termination exit fee amendment for its tariff of general applicability."[7]

With respect to Norwood's argument that the CTC, as applied to Norwood, would be unduly discriminatory as compared to the CTC paid by NEPCO's affiliates, it is true that the CTC formulas applicable to NEPCO's affiliates differ from the CTC calculation approved in this proceeding.[8] The CTCs applicable to NEPCO's affiliates, however, were the subject of negotiated settlements regarding the payment of the CTCs and other issues. Under these circumstances, the differences between the CTCs do not give rise to a claim of undue discrimination.[9]

Norwood also raises other arguments which we reject. Contrary to Norwood's claims, NEPCO properly used our abbreviated filing requirements in this case, because payment of the CTC will not result in a rate increase over the existing Tariff No. 1 rates. Because these existing "filed rates" remain in effect, moreover, there is no violation of the filed rate doctrine, as Norwood argues. We also reject Norwood's assertion that NEPCO is barred from collecting a CTC under Section 212 of the FPA, 16 U.S.C. § 824k (1994). The rate

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[7] 83 FERC at p. 61,724 .8

[8] *See* 83 FERC ¶ 61,265, at p. 62,104; 83 FERC ¶ 61,085, at p. 61,419, n.5.

[9] *Cities of Bethany, et al. v. FERC*, 727 F.2d 1131, 1139 (D.C. Cir.), *cert. denied*, 469 U.S. 917 (1984); *see also Pacific Gas and Electric Co., et al.*, 51 FERC ¶ 61,371, at p. 62,264, *order denying reh'g*, 52 FERC ¶ 61,318 (1990).

conditions set forth in Section 212, on which Norwood relies, have no applicability to NEPCO's CTC. Nor does the CTC constitute an unlawful award of contract damages (as Norwood would have it) since the payment of the CTC is not premised on a breach of contract, but rather on the fulfillment of the parties' contract obligations. We also dismiss Norwood's claim that NEPCO is not a "public utility." Notwithstanding NEPCO's divestiture of some of its generating facilities, NEPCO remains a public utility that continues to be engaged in the sale of electric energy at wholesale in interstate commerce and the transmission of electric energy in interstate commerce. In addition, we reject Norwood's assertion that an evidentiary hearing in this case was necessary, given our finding in the May 15 order that no party raised any issue of material fact requiring an evidentiary proceeding.

Finally, we will summarily reject Norwood's arguments that the CTC violates the Commission's stranded cost requirements under Order No. 888 and that NEPCO's filing should have been dismissed, or in the alternative held in abeyance, pending the outcome of Norwood's pending litigation in the District Court of Massachusetts. We already fully considered and rejected these arguments in the May 15 order.[10]

The Commission orders:

(A) Norwood's request for clarification and, in the alternative, for rehearing, is hereby denied, as discussed in the body of this order.

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[10] 83 FERC at pp. 61,723-24.

83 F.E.R.C. ¶ 61,174 (1998)

New England Power Company,
Docket No. ER98-2233-000

Order Accepting Amendment for Filing

(Issued May 15, 1998)

Before Commissioners: James J. Hoecker, Chairman; Vicky A. Bailey, William L. Massey, Linda Breathitt, and Curt Hebert, Jr.

On March 18, 1998, New England Power Company (NEPCO) filed an amendment to its FERC Electric Tariff, Original Volume No. 1 (Tariff No. 1), to permit its Tariff No. 1 customers the option of terminating service early, subject to the payment of a contract termination charge (CTC). As discussed below, NEPCO's amendment is accepted for filing, without suspension or hearing, to become effective on March 31, 1998.

Background

NEPCO provides wholesale requirements service under Tariff No. 1 subject to a term provision that is set forth at Schedule I, Section N. The term provision currently provides, in its entirety, that "[o]nce initiated, service under this tariff shall continue until terminated by either party giving to the other at least seven years' written notice of termination directed to the end of the calendar month."

In its filing, NEPCO proposes to modify Section N to permit a customer, at its election, to terminate service early, subject to the payment of a CTC. The CTC would be based on a formula set forth in proposed Section II-C of Tariff No. 1 and is based on the revenues lost approach approved by the Commission in Order

No. 888[1] for calculating stranded costs. NEPCO states, however, that the proposed amendment is not designed to recover extra-contractual costs and therefore is not a mechanism for recovering stranded costs, as defined in Order No. 888.

NEPCO states that the CTC formula is designed to compensate NEPCO for the revenues it would otherwise be entitled to collect in the absence of the customer's early termination of its Tariff No. 1 service agreement, as adjusted for the revenues attributable to NEPCO's transmission costs. The CTC would be collected by NEPCO until such time as the customer could have unilaterally terminated service under Schedule I, Section N and any applicable provisions of the customer's service agreement with NEPCO.[2]

NEPCO states that its proposed amendment implements a commitment it made as part of its application in Docket Nos. EC98-1-000 and ER98-6-000, wherein NEPCO, among other things, proposed to divest certain jurisdictional facilities as part of the sale of substantially all of its nonnuclear generating assets to USGen New England, Inc. (USGenNE) and agreed to offer its Tariff No. 1 customers an "open season" in which they could terminate their wholesale requirements service early, subject to the payment of a CTC.[3] The Com-

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[1] *Promoting Wholesale Competition Through Open Acess Non-Discriminatory Transmission Services by Public Utilities and Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, Order No. 888, 61 Fed. Reg. 21,540 (May 10, 1996), *FERC Statutes and Regulations*, Regulations Preambles January 1991-June 1996 ¶ 31,036 (1996), *order on reh'g*, Order No. 888A , 62 Fed. Reg. 12,274 (March 14, 1997), *FERC Statutes and Regulations* ¶ 31,048 (1997), *order on reh'g*, Order No. 888-B , 81 FERC ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 FERC ¶ 61,046 (1998).

[2] Application at Exhibit A, Schedule II-C, Section B(3)(b).

[3] The proposed divestiture was the product of settlements entered into among NEPCO's parent company, the New England Electric System

mission, among other things, approved the proposed divestiture of jurisdictional facilities on February 25, 1998.[4]

NEPCO states that the proposed amendment would be available to those customers who have not entered into a negotiated agreement with NEPCO to terminate their Tariff No. 1 service early.[5] NEPCO emphasizes, however, that it stands ready to negotiate termination agreements with its wholesale requirements customers on mutually agreeable terms.

NEPCO states that its proposed amendment would permit one of its wholesale requirements customers, the Town of Norwood, Massachusetts (Norwood), to terminate its existing Tariff No. 1 service effective April 1, 1998, consistent with Norwood's written notice to NEPCO, dated March 4, 1998.[6] NEPCO states that absent the proposed amendment, Norwood would not be permitted to terminate its Tariff No. 1 service

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(NEES), its subsidiaries, the Massachusetts Attorney General, Rhode Island and Massachusetts regulatory agencies, and other parties, which was entered into to implement retail choice programs in Massachusetts and Rhode Island.

[4] *New England Power Company, Narragansett Electric Company, All-Energy Marketing Company, L.L.C., and USGen New England, Inc.*, 82 FERC ¶ 61,179 (1998), *reh'g pending*.

[5] The Commission has previously approved negotiated agreements for the early termination of Tariff No. 1 service between NEPCO and its affiliates, *Massachusetts Electric Company and Narragansett Electric Company in New England Power Company*, 81 FERC ¶ 61,281 (1997); between NEPCO and the *Town of Littleton, New Hampshire in New England Power Company*, 81 FERC ¶ 61,334 (1997); and between NEPCO and its affiliate *Granite State Electric Company in New England Power Company*, 83 FERC 1161,085 (1998).

[6] NEPCO's Application at Exhibit C. NEPCO states that it received Norwood's written notice on March 5, 1998. Although the proposed amendment would require 30 days advance written notice of termination, NEPCO states that it is willing to waive this requirement with respect to Norwood.

prior to November 1, 2008 because of certain conditions set forth in Norwood's service agreement.[7]

NEPCO requests that its amendment be made effective March 31, 1998 and seeks waiver of the Commission's notice requirement pursuant to 18 C.F.R. § 35.11 (1997).

Notice of Filings and Interventions

Notice of NEPCO's filing was published in the *Federal Register*,[8] with comments, protests, and motions to intervene due on or before April 7, 1998. A motion to intervene and motion to reject was timely filed by Norwood.

Norwood asserts in its motion that NEPCO's proposed CTC fails to satisfy two of the Commission's requirements for stranded cost recovery as set forth in Order No. 888. Specifically, Norwood argues that it is not now and does not intend to become an unbundled wholesale transmission service customer of NEPCO and that NEPCO does not have a "reasonable expectation" of continuing to provide wholesale requirements service to Norwood following the expiration of Norwood's service agreement.

Norwood also argues that the Commission should dismiss NEPCO's filing pending resolution of an earlier-filed action

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[7] Application at Exhibit D. Norwood's service agreement was executed on April 11, 1983. It was subsequently amended on January 11, 1989 to provide, *inter alia*, that "[n]either NEP[CO] nor Norwood will give notice of termination prior to November 1, 1991 and shall not specify a termination date prior to November 1, 1998, provided, however, that Norwood may elect to extend the earliest date by which either party can give notice of intent to terminate by a total of 20 years in two ten-year increments." *Id.* Subsequently, by written notice provided July 25, 1990, Norwood "extend[ed] the date by which either NEP[CO] or Norwood could give notice of intent to terminate service from the present date of November 1, 1991, contained in the Power Contract between NEP[CO] and Norwood dated April 11, 1983, to November 1, 2001." *Id.*

[8] 63 Fed. Reg. 16,488 (1998).

now pending in the United States District Court for the District of Massachusetts.[9] Norwood states that the complaint filed in that proceeding alleges that NEPCO's voluntary divestiture of non-nuclear generation facilities resulted in a breach and violation of a Decree and Order issued by the District Court on April 12, 1983,[10] a breach of contract under Norwood's service agreement with NEPCO, and a violation of federal antitrust statutes. Norwood contends that in the event its requested relief is granted by the District Court, NEPCO would not be entitled to recover stranded costs from Norwood because the service agreement between the parties would be deemed to be terminated and Norwood would not thereafter become a transmission customer of NEPCO. However, "Norwood does not request a hearing in this proceeding."

NEPCO filed an answer to Norwood's pleading. In its answer, NEPCO argues, inter alia, that its proposed CTC is consistent with Order No. 888, that Norwood has not demonstrated that NEPCO has breached its contract obligations to Norwood, and that Norwood's additional arguments in opposition to the amendment are baseless. Norwood subsequently filed an answer to NEPCO's answer.

Discussion

Procedural Matters

Pursuant to Rule 214 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.214 (1997), the timely, unopposed motion to intervene of Norwood serves to make it a party to this proceeding. Pursuant to Commission Rule 213(a)(2), 18 C.F.R. §385.213 (a)(2) (1997), we hereby reject the answers filed by NEPCO and Norwood.

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[9] *Town of Norwood v. New England Power Co., et al.*, No. 907-10818-PBS (D. Mass. filed April 14, 1997).

[10] *Town of Norwood v. New England Power Company*, No. 74-4104-T (D. Mass. April 12, 1983).

Analysis

As explained below, we will accept NEPCO's proposed amendment to Tariff No. 1 without hearing or suspension. We will grant waiver of our notice requirement and allow the amendment to become effective March 31, 1998.

The proposed amendment provides NEPCO's Tariff No. 1 customers with the option of buying out their service agreements by the payment of a CTC. The right to buy-out and thus terminate service would be supplemental to, and generally consistent with, the existing opportunity available to Tariff No. 1 customers to seek to modify and/or terminate their contracts.[11] In Order No. 888-A , for example, we stated that a customer may seek to shorten the term of the contract and that "any contract modification approved by the Commission will take into account the issue of appropriate stranded cost recovery by the customer's supplying utility."[12]

The proposed formula for calculating the CTC would recover the revenues lost over the existing seven-year notice term, less an estimate of the market value of the released capacity and energy.[13] Payment of the full demand charges over the remainder of the contract term would thus be avoided. Under the circumstances presented, we find the proposed amendment to be reasonable and therefore will accept it.

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[11] *See, e.g.*, Order No. 888 at pp. 31,664-65; Order No. 888-A at p. 30,193.

[12] Order No. 888-A, at p. 30,193; *see also* Order No. 888 at p. 31,664.

[13] The proposed formula for CTC calculation differs from that applicable to other wholesale power customers (*see supra* note 5), including affiliates, that have entered into negotiated agreements with NEPCO for the early termination of Tariff No. 1 service. NEPCO explains that it remains willing to negotiate similar termination agreements, with Norwood and other wholesale requirements customers, and that the proposed amendment provides an early termination option to non-settling customers such as Norwood.

We further find that Norwood's arguments in opposition to the amendment are without merit. First, Norwood's reliance on the stranded cost recovery requirements set forth at 18 C.F.R. §35.26 (1997) are misplaced, because NEPCO's CTC would recover costs that are solely attributable to a customer's existing Tariff No. 1 contract obligations.

Second, Norwood's request that the Commission dismiss NEPCO's filing in deference to Norwood's pending court litigation is without merit. Under Section 205(d) of the Federal Power Act (FPA), 16 U.S.C. §824 d (1994), a public utility such as NEPCO generally has a right to file proposed changes in the rates, terms or conditions of service or any contract relating thereto, and typically the Commission must act within 60 days of a filing. The fact that Norwood is litigating in court the issue of whether NEPCO's voluntary divestiture of its non-nuclear generation facilities constituted a breach of contract on NEPCO's part does not affect NEPCO's right to seek from this Commission an early termination exit fee amendment for its tariff of general applicability. NEPCO is offering customers an option they would not otherwise have unless the customers were to file a Section 206 proceeding to amend the contract and bear the burden of presenting evidence that the contract is no longer just and reasonable (and, in Norwood's case, that Norwood should be able to break the contract without paying costs owed under the contract). Norwood, of course, can always file a Section 206 complaint, as discussed above, during the pendency of the court action.

The Commission orders:

(A) NEPCO's amendment to Tariff No. 1 is hereby accepted for filing, without suspension or hearing, to become effective on March 31, 1998, as discussed in the body of this order.

(B) NEPCO is hereby informed of the rate schedule designations shown on the Attatchment.

Attachment

New England Power Company

Docket No. ER98-2233-000

Rate Schedule Designations

Effective Date: March 31, 1998

Designation--Description

Fourth Revised Page No. 9 under FERC Electric Tariff, Original Volume No. 1 (Supersedes Third Revised Page No. 9)--Revised Term of Service

Original Sheet Nos. 1-5 of Schedule II-C under FERC Electric Tariff, Original Volume No. 1—Formula for the Calculation of Contract Termination Charges

APPENDIX H

GLOSSARY

ALJ: Administrative Law Judge.

APA: Administrative Procedure Act.

CTC: Contract termination charge.

FERC: Federal Energy Regulatory Commission

FPA: Federal Power Act, 16 U.S.C. § 792 *et. seq.*

Hearing Order: Order Setting Complaint for Hearing in Part and Dismissing It in Part and Establishing Settlement Judge Procedures, *Town of Norwood, Mass. v. National Grid USA*, 104 F.E.R.C. ¶ 61,030 (2003).

Initial Decision: Initial Decision, *Town of Norwood, Mass. v. National Grid USA*, 107 F.E.R.C. ¶ 63,041 (2004).

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Lockyer: *Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2004), *petitions for cert. filed*, 75 U.S.L.W. 3355 (U.S. Dec. 28, 2006) (No. 06-888), *and* 75 U.S.L.W. 3410 (U.S. Feb. 5, 2007) (No. 06-1100).

NEP: New England Power Company

***Norwood I*:** *Town of Norwood v. FERC*, 202 F.3d 392 (1st Cir. 2000).

Order Accepting CTC Amendment: Order Accepting Amendment for Filing, *New England Power Co.*, 83 F.E.R.C. ¶ 61,174 (1998).

Order No. 888: Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed.

Reg. 21,539 (May 10, 1996), [1991–1996 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,036, *clarified*, 76 F.E.R.C. ¶ 61,009 (1996), *modified*, Order No. 888-A, 62 Fed. Reg. 12,274 (Mar. 14, 1997), [1996–2000 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,048, *order on reh'g*, Order No. 888-B, 62 Fed. Reg. 64,688 (Dec. 9, 1997), 81 F.E.R.C. ¶ 61,248 (1997), *order on reh'g*, Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998), *aff'd in part and remanded in part sub nom. Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002).

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***P.U.C.*:** *Pub. Utils. Comm'n of Cal. v. FERC*, 474 F.3d 587 (9th Cir. 2006).

***P.U.D.*:** *Pub. Util. Dist. No. 1 of Snohomish County, Wash. v. FERC*, 471 F.3d 1053 (9th Cir. 2006).

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***Town of Norwood*:** *Town of Norwood v. FERC*, 476 F.3d 18 (1st Cir. 2007).

No. 06-1470

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IN THE

Supreme Court of the United States

TOWN OF NORWOOD, MASSACHUSETTS,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the First Circuit

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BRIEF OF RESPONDENT NEW ENGLAND POWER COMPANY IN OPPOSITION

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QUESTION PRESENTED

The Federal Power Act (the "FPA" or the "Act") requires the Federal Energy Regulatory Commission ("FERC" or the "Commission") to determine whether rates and charges imposed in connection with the sale of electric energy for resale are "just and reasonable." In 1998, FERC exercised that authority to accept an amendment to a wholesale electric tariff giving each customer the right to terminate service before its contract expired, upon payment of a termination charge calculated under the formula set forth in the tariff amendment. Did FERC act unlawfully when it refused in 2005 to afford a second opportunity to challenge the termination charge formula to Petitioner, a customer that elected to terminate service early and unsuccessfully argued in the 1998 FERC proceeding that the tariff amendment's formula and the termination charges it produced were not just and reasonable?

RULE 29.6 STATEMENT

New England Power Company is a wholly owned subsidiary of National Grid USA, which is a wholly owned indirect subsidiary of National Grid plc, a United Kingdom-based company that has issued common stock to the public. New England Power Company intervened in support of FERC in the Court of Appeals.

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IN THE

Supreme Court of the United States

No. 06-1470

TOWN OF NORWOOD, MASSACHUSETTS,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION, *et al.*,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals For the First Circuit

BRIEF OF RESPONDENT NEW ENGLAND POWER COMPANY IN OPPOSITION

STATEMENT OF THE CASE

Petitioner was a wholesale power customer of New England Power Company ("NEP") under a 1983 contract whose term extended through October 2008. Under the contract, Petitioner agreed to purchase its

requirements of electricity under NEP's wholesale tariff, on file with the Federal Energy Regulatory Commission ("FERC" or the "Commission"), as in effect from time to time. This dispute stems from Petitioner's unilateral decision to terminate that contract more than ten years prematurely, as of April 1, 1998, without paying the early termination charge specified in the tariff. In 1998, Petitioner unsuccessfully challenged FERC's order approving the formula rate for calculating the termination charge, and in 2000, the United States Court of Appeals for the First Circuit affirmed FERC's ruling. Petitioner now seeks review of a Court of Appeals ruling denying it a further opportunity to challenge the reasonableness of the termination charges. This is the fifth time Petitioner has asked the Court to review adverse rulings issued by a federal or state court in this long-running dispute.[1]

Background

For many years, NEP supplied electricity at wholesale to affiliated and unaffiliated customers who distributed that electricity to their retail customers. NEP's sales were governed by a tariff on file with and regulated by FERC. Petitioner Town of Norwood,

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[1] *See Town of Norwood v. FERC*, 202 F.3d 392 (1st Cir.), *cert. denied*, 531 U.S. 818 (2000) ("*Norwood I*"); *Town of Norwood v. New England Power Co.*, 202 F.3d 408 (1st Cir.), *cert. denied*, 531 U.S. 818 (2000) ("*Norwood II*"); *Town of Norwood v. FERC*, 217 F.3d 24 (1st Cir. 2000), *cert. denied*, 532 U.S. 993 (2001) ("*Norwood III*"); *New England Power Co. v. Town of Norwood*, 59 Mass. App. Ct. 1106, 797 N.E.2d 26, *pet. for further review denied*, 440 Mass. 1108, 799 N.E.2d 594 (2003), *cert. denied*, 541 U.S. 1073 (2004).

Massachusetts ("Norwood"), was one of NEP's wholesale customers.

In 1998, as part of the transition to competitive electricity markets in New England, which allowed retail customers to purchase electricity from suppliers of their choosing, NEP entered into settlements with state agencies representing the interests of the retail customers of its affiliated distribution customers. The settlements amended the affiliated distributors' wholesale power purchase agreements to allow early termination, contingent upon payment of agreed-upon termination charges. The revisions ensured that the affiliated distributors did not have to keep purchasing wholesale power from NEP once their retail customers became free to choose other suppliers. NEP also agreed to sell its non-nuclear generating facilities in an arrangement to which state regulatory authorities likewise agreed. NEP sought FERC approval of the settlements allowing early termination by its affiliated wholesale customers and the associated termination charges, as well as the sale of its non-nuclear generating assets. Norwood intervened in opposition to each application, but FERC nevertheless approved them. *New England Power Co., et al.*, 82 FERC ¶ 61,179 at 61,656, *reh'g denied*, 83 FERC 61,275 (1998); *New England Power Co.*, 81 FERC ¶ 61,281 at 62,370 (1997), *reh'g denied*, 83 FERC ¶ 61,265 (1998).

NEP offered its unaffiliated wholesale distributors, including Norwood, the same opportunity to terminate service early, upon payment of termination charges proportional to those paid by the affiliated customers, even though State law did not obligate those

distributors to allow their retail customers to choose other suppliers. Some unaffiliated distributors accepted this offer and entered into settlements with NEP; Norwood declined NEP's invitation.

Norwood's Notice of Termination and NEP's Tariff Filing

On March 4, 1998, after FERC approved the asset sales and the settlements with NEP's affiliates, Petitioner sent a letter to NEP purporting to terminate its power purchase contract as of April 1, 1998, and informing NEP that it had signed a contract with another wholesale supplier. NEP responded that Petitioner's contract did not expire until October 31, 2008 and that Petitioner had no right to terminate it over ten years early.

Nonetheless, to facilitate the transition to a competitive market, NEP filed with FERC an amendment to its wholesale tariff to give its non-settling customers, including Petitioner, the option of early contract termination, conditioned on payment of a contract termination charge ("CTC"), payable in equal monthly installments over the remaining term of the customer's contract. The tariff amendment included a formula rate for calculating the CTC payable by a terminating customer (the "CTC Formula"), based upon (a) an estimate of the payments the terminating customer would have made over the remaining term of its contract, applying the then-effective tariff rates to its current level of purchases, less (b) an estimate of the market value of the electricity. Pet.App. 280a. NEP also reiterated its offer to allow non-settling customers, including Petitioner,

to pay termination charges proportional to those paid by customers who had settled. *Id.*

In light of Norwood's purported notice of termination and in compliance with FERC's regulations, 18 C.F.R. § 35.13(c) (2006), NEP included with its filing an exhibit containing an estimate of the CTC that Norwood would have to pay under the proposed CTC Formula rate if Norwood proceeded with its plan to terminate service early and again rejected NEP's settlement offer. That estimate showed that Norwood would owe a termination charge of approximately $53 million if paid in a lump sum, or approximately $78 million if paid in monthly installments through October 2008. This compared to a total of approximately $198 million Norwood was obligated to pay for electricity at the current tariff rates and level of usage over the remaining term of its contract. *Norwood I*, Pet.App. 242a; JA 697.

Although Norwood opposed the tariff amendment allowing NEP's customers to terminate purchases early and establishing the CTC Formula rate to calculate the CTC due from any customer choosing to do so, FERC found "the proposed amendment to be reasonable and therefore . . . accept[ed] it." *New England Power Co.*, 83 FERC ¶ 61,174 at 61,723, *reh'g denied*, 84 FERC ¶ 61,175 (1998), Pet.App. 280a.

Previous Litigation

Petitioner proceeded to change wholesale suppliers, declined NEP's renewed settlement offer, and refused to make the CTC payments due under the tariff (thereby incurring additional obligations for late

payment charges). Instead, it attempted to avoid any obligation to pay a termination charge through litigation in federal and state courts.

Petitioner first filed a civil action in federal district court, challenging NEP's sale of its non-nuclear generating assets as a breach of contract and on antitrust grounds. The district court dismissed the complaint and, in *Norwood II*, the First Circuit affirmed on all but one antitrust count, which it remanded to the district court (where Petitioner has not pursued it). This Court denied Norwood's petition for certiorari.

Petitioner next sought review of FERC's orders approving NEP's asset sale, the settlement agreements establishing termination charges for NEP's affiliated customers, and the tariff amendment establishing the CTC payable by customers who chose to terminate purchases from NEP early but refused NEP's settlement offer. The First Circuit consolidated the appeals in *Norwood I* and affirmed each of the Commission's orders in all respects. Among other rulings, the court rejected Petitioner's claims that the tariff amendment's CTC Formula rate was not shown to be just and reasonable and that the formula rate unduly discriminated against customers that, like Norwood, elected not to settle. *Norwood I*, Pet.App. 237a-247a. Again, this Court denied Norwood's petition for certiorari.

Petitioner then asked FERC to declare that Petitioner's 1990 extension of its purchase contract with NEP was ineffective, and that, as a result, the contract terminated on October 31, 1998, rather than on October 31, 2008. The Commission denied the request and the

First Circuit affirmed. *Town of Norwood*, 87 FERC ¶ 61,341 (1999), *aff'd Norwood III*. The Court denied Norwood's third petition for certiorari.

Because Petitioner still refused to pay the CTC installments due under the tariff, NEP brought a breach of contract action in Massachusetts state court in December 1998 to collect overdue CTC payments and late payment charges. In 2001, the Massachusetts trial court granted NEP's motion for summary judgment as to Norwood's liability for the unpaid CTC installments ($27,149,054.08 through January 31, 2001). *New England Power Co. v. Town of Norwood*, 2001 WL 292974 (Mass. Super. 2001); *New England Power Co. v. Town of Norwood*, 2001 WL 543172 (Mass. Super. 2001). The Massachusetts Appeals Court denied Norwood's appeal, the Massachusetts Supreme Judicial Court denied its petition for further appellate review and this Court denied its fourth petition for certiorari. *New England Power Co. v. Town of Norwood*, Case 01-P-1467, 59 Mass. App. Ct. 1106, 797 N.E.2d 26, *pet. for further review denied*, 440 Mass. 1108, 799 N.E.2d 594 (2003), *cert. denied*, 541 U.S. 1073 (2004).

Petitioner then filed a motion for relief from the judgment, which the trial court denied, and the Massachusetts appellate courts affirmed. *See New England Power Company v. Town of Norwood*, 66 Mass. App. Ct. 1108, 847 N.E.2d 366 (Mass. App. 2006), *pet. for further review denied* (Mass. June 29, 2006).

Norwood's 2002 FERC Complaint

After the state trial court ruled against it the first time, on December 23, 2002, Petitioner filed a

complaint at FERC under section 206 of the FPA, 16 U.S.C. § 824e, against NEP and certain of its affiliates. The complaint asserted thirteen claims in which Petitioner alleged that the CTC was unjust, unreasonable, and unduly discriminatory. In a July 2003 order, FERC summarily denied eight of Petitioner's claims as impermissible attempts to relitigate issues previously decided by FERC and the First Circuit, including Petitioner's obligation to pay the CTC calculated in accordance with the CTC Formula rate FERC accepted in 1998. *Town of Norwood v. National Grid USA*, 104 FERC ¶ 61,030 (2003), Pet. App. 121a-122a. FERC allowed Norwood to proceed on five claims that, on their surface, appeared to challenge NEP's implementation of the tariff's approved CTC Formula, rather than the reasonableness of the formula rate itself. *Id.*, Pet.App. 120a-121a.

After a hearing before a FERC administrative law judge, FERC denied Petitioner's complaint with respect to the CTC, holding that NEP correctly applied the tariff's CTC Formula rate to calculate Norwood's CTC and Petitioner could not relitigate the reasonableness of that rate. However, FERC adjusted the interest rate used to calculate late payment charges, based on Norwood's argument that NEP applied the wrong tariff provision to calculate those charges. *Town of Norwood v. National Grid USA*, 112 FERC ¶ 61,099 (2005), Pet.App. 24a-61a. On rehearing, FERC affirmed its rulings on the CTC, stating that it had previously decided each of Norwood's claims when it approved the addition of the CTC Formula rate to NEP's tariff, and that the First Circuit affirmed that decision in *Norwood I*. FERC also reversed itself on the late

payment interest issue, concluding that NEP had applied the correct tariff provision. *Town of Norwood v. National Grid USA*, 114 FERC ¶ 61,187 (2006), Pet.App. 74a-91a. FERC confirmed NEP's calculation of monthly CTC installments of $599,971, yielding a total of $76.2 million in CTC payments due over the 127 months remaining on Norwood's contract when it terminated, plus late payment charges. Pet.App. 93a. FERC denied Norwood's request for further rehearing and for a stay pending appeal. *Town of Norwood v. National Grid USA*, 115 FERC ¶ 61,396 (2006), Pet.App. 95a-111a.

Petitioner sought judicial review in the First Circuit, which upheld FERC's ruling that FERC's acceptance of the formula rate in its 1998 ruling, as affirmed in *Norwood I*, foreclosed Petitioner's attacks on the reasonableness of the CTC produced by the CTC Formula rate. *Town of Norwood v. FERC*, 476 F.3d 18 (1st Cir. 2007), Pet.App. 10a. The court held that *res judicata* barred Norwood from bringing "attacks on the reasonableness of the formula" that could have been raised, or were unsuccessfully raised, when the CTC Formula was filed with FERC. *Id.* The court remanded to FERC the issue of the justness and reasonableness of the interest rate on late payments, which FERC addressed in a ruling issued on May 17, 2007. *Town of Norwood v. National Grid USA*, 119 FERC ¶ 61,148 (2007).

REASONS FOR DENYING THE PETITION

This case does not present any novel or important question concerning the extent of FERC's jurisdiction or statutory authority. It involves only prosaic

questions of claims preclusion and agency practice that arise in the unique context of this dispute, which spans nine years and numerous proceedings before the FERC and the federal and state courts, but which affects only the parties.

1. Petitioner's principal contention is that the court below erred when it held that *res judicata* bars Petitioner from relitigating the justness and reasonableness of the termination charge produced by the CTC Formula rate. Pet. 15. This contention is founded on Petitioner's assertion that FERC did not consider the justness and reasonableness of the CTC Formula or the resulting CTC when FERC accepted the tariff amendment in 1998. Pet. 4, 14, 15, 21. This assertion, upon which Petitioner's argument hinges, is entirely unsupported. It rests on a gross misrepresentation of the earlier proceeding and of the rulings of FERC and the Court of Appeals in that proceeding.

In fact, Petitioner had a full opportunity to challenge the justness and reasonableness of the CTC Formula rate in the 1998 proceeding and presented such a challenge to FERC and the First Circuit. The fact that Petitioner could have raised this claim in the 1998 FERC proceeding is alone sufficient to bar it from litigating the issue now, even if Norwood had not pursued the issue at that time. Pet.App. 11a, citing Restatement (Second) of Judgments § 24 (1982); *see also San Remo Hotel, L.P. v. City and County of San Francisco*, 545 U.S. 323, 336 n.16 (2005), quoting *Allen v. McCurry*, 449 U.S. 90, 94 (1980) (*res judicata* bars relitigation of

"issues that were or could have been raised" in prior litigation).

Moreover, Petitioner did mount a challenge to the CTC Formula rate and the charge it produced in the 1998 FERC proceeding, arguing that the CTC was inconsistent with the "just and reasonable" standard of section 205 of the FPA, 16 U.S.C. § 824d. Petitioner presented its opposition to the justness and reasonableness of the CTC most prominently in the 80-page pleading that it filed in June 1998 to request rehearing of FERC's May 15, 1998 order, in which FERC accepted as "reasonable" the amendment that added the CTC Formula rate to NEP's tariff. Pet.App. 280a; JA 992-1072.[2] Petitioner argued, among other things, that NEP had failed to demonstrate that the CTC Formula rate is just and reasonable, as section 205 requires, and had failed to provide support for the formula rate's result, as applied to Norwood: a total of approximately $78 million in monthly CTC payments. Supp.App. 1a-8a. Norwood demanded a hearing on its allegations. *Id.* at 2a, 8a.

Both FERC and the First Circuit considered and denied Petitioner's challenge to the justness and reasonableness of the CTC Formula and the charges it produced. FERC denied Petitioner's request for rehearing in August 1998, finding that Petitioner's arguments against the reasonableness of the CTC failed to raise any issue of material fact requiring

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[2] An excerpt from Norwood's lengthy request for rehearing is provided as a Supplemental Appendix attached to this brief, cited as "Supp.App."

investigation and hearing. Pet.App. 274a. Petitioner challenged this ruling on judicial review, but the First Circuit affirmed in *Norwood I*. Pet.App. 242a ("Norwood says that [NEP] has failed to supply data to show that it is 'just and reasonable' to require Norwood to pay a [CTC] . . . amounting to $78 million."). The court held that Norwood failed to support its assertion that the CTC Formula rate violated the just and reasonable standard or to articulate any legitimate objection to the calculation of the CTC, "let alone tried to support it with citations or figures." *Id.* This Court denied Norwood's petition for certiorari to review the First Circuit's decision.

Petitioner's disappointment with the outcome of its 1998 challenge to the justness and reasonableness of the CTC does not change the fact that Petitioner had its day in court. It simply is not the case that the FERC in 1998 and the Court of Appeals in 2000 failed to "examine" the consistency of the charges produced by the CTC Formula rate with the just and reasonable standard of section 205. Pet. 25. Petitioner raised this very issue, but FERC and the Court of Appeals each found its arguments unpersuasive.

The court below broke no new ground when it held that Petitioner is not entitled to advance different or modified arguments to present a second challenge to the justness and reasonableness of the termination charge produced by the CTC Formula, when Norwood had the opportunity to challenge the formula rate in 1998, and did so. As the court below correctly held, *res judicata* applies to agency decisions issued to resolve disputes between two parties, as FERC did in 1998.

Pet.App. 11a, citing *Aunyx Corp. v. Canon U.S.A., Inc.*, 978 F.2d 3, 7 (1st Cir. 1992); *see also United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966) ("the courts have not hesitated to apply *res judicata* to enforce repose" where an agency has acted in a judicial capacity to resolve a dispute). The court also noted that allowing Petitioner to bring a new challenge to the justness and reasonableness of the charges produced by the CTC Formula rate would create never-ending opportunities for additional challenges, which "would frustrate the values of repose and efficiency that the *res judicata* doctrine is meant to protect." Pet.App. 10a, citing *Univ. of Tennessee v. Elliott*, 478 U.S. 788, 798 (1986).

2. Petitioner's attempts to avoid the preclusive effect of FERC's ruling in 1998 and the Court of Appeals' decision in *Norwood I* are unfounded and, in any event, present no issue warranting further review.

Petitioner primarily contends that FERC's rulings in 1998 and the First Circuit's decision in *Norwood I* explicitly held open the prospect of a later challenge to the justness and reasonableness of the CTC Formula rate. Pet. 20-21. That, however, is not how FERC and the First Circuit read their earlier rulings. The First Circuit explained that its earlier decision left open only a challenge to "the proper computation of the [CTC payable by Petitioner] *according to the formula* - not new attacks on the formula itself." Pet.App. 11a (emphasis in original). FERC likewise characterized its acceptance of the CTC Formula rate in 1998 as having "found the Norwood CTC formula to be just and reasonable," leaving open for investigation only

whether NEP "failed to follow the formula in determining the CTC." Pet.App. 86a.

Petitioner found nothing substantial to question in NEP's implementation of the approved CTC Formula rate to calculate the CTC charged to Norwood. Instead, Petitioner sought changes to the CTC Formula rate, arguing that without modification the formula produced a CTC that was unreasonable and discriminatory. Pet.App. 10a. The court below correctly held that FERC's 1998 denial of Petitioner's request for rejection of the CTC Formula or a hearing as to its merits foreclosed Norwood from arguing again that application of the CTC Formula in accordance with its terms produced unreasonable results. That ruling and its affirmation in *Norwood I* "resolved the reasonableness issue in what was effectively a final judgment" that was not open to renewed attack in a new proceeding. Pet.App. 11a. Norwood's disagreement with the First Circuit's and FERC's interpretations of their prior rulings is unfounded and, in any event, does not raise any issue whose importance extends beyond the confines of this case.

Next, Petitioner argues that FERC's acceptance of the CTC Formula rate in 1998, but not the specific CTC charges produced by application of the formula rate, left the door open for Norwood to challenge in a future proceeding the reasonableness of "components of the formula," *i.e.*, whether the formula should be modified to include new or different calculations. Pet. 21-22. Both FERC and the First Circuit found Norwood's purported distinction to be invalid. FERC explained that it had exercised its "ample discretion" to accept a

formula rate for the calculation of the CTC payable by any NEP customer that might choose to terminate purchases early and to decline NEP's alternative settlement offer. Pet.App. 86a, citing *Public Utils. Comm'n of California v. FERC*, 254 F.3d 250, 254 (D.C. Cir 2001), quoting *Transwestern Pipeline Co. v. FERC*, 897 F.2d 570, 578 (D.C. Cir. 1990) ("It can hardly be doubted at this late date that the Commission 'need not confine rates to specific, absolute numbers but may approve a tariff containing a rate 'formula' . . . .'"); *see also Norwood I*, Pet.App. 242a (the CTC "is a formula-driven charge . . . calculated based on rates already approved by FERC"). Where, as here, a tariff contains a formula that "specifies the cost components that form the basis of the rates a utility charges its customers. . . . 'the formula itself is the rate.'" *Pub. Utils. Comm'n v. FERC*, 254 F.3d at 254, quoting *Ocean State Power II*, 69 FERC ¶ 61,146, 61,544 (1994); *see also, e.g., Alabama Power Co. v. FERC*, 993 F.2d 1557, 1567-68 (D.C. Cir. 1993). FERC's finding in 1998 that the CTC Formula rate is just and reasonable, Pet.App. 86a, thus necessarily encompassed the formula's specification of certain "cost components" and foreclosed Petitioner from arguing that the formula should have included additional or different factors.

Petitioner finally argues that *res judicata* has only limited application to administrative ratemaking, citing *Tagg Bros. v. United States*, 280 U.S. 420 (1930). Pet. 23. Petitioner's reliance on *Tagg Bros.* is misplaced. That case stands for the unremarkable proposition that, when the rate for ongoing regulated service is at issue, *res judicata* does not bar a customer from arguing that a rate found to be just and reasonable in the past has

become unjust or unreasonable for service provided subsequently due to changed circumstances. *See id.* at 445; *Tesoro Alaska Petroleum Co. v. FERC*, 234 F.3d 1286, 1290 (D.C. Cir. 2000). The court below correctly recognized that this principle has no application here because this case does *not* involve ongoing service. To the contrary, NEP's service to Norwood ceased - at Norwood's insistence - on April 1, 1998 and "[t]he [termination] charge became a fixed and final contractual obligation at the time of termination." Pet.App. 12a. No charges for services rendered after termination were open to re-examination because no services were rendered after termination.

The decision below therefore does not represent the "expansion of the *res judicata* doctrine" that Petitioner decries. Pet. 23. Rather, the Court of Appeals applied well-settled principles to hold that Petitioner is barred from resuscitating the challenges to the justness and reasonableness of the CTC Formula rate that FERC and the First Circuit rejected in 1998 and 2000, respectively, by presenting alternative formulations of arguments that failed to persuade the first time. The ruling below was plainly correct and, moreover, presents no issue of broad importance that merits further review.

3. Petitioner attempts to burnish the significance of this case by claiming that it raises the same issues as three cases from the Ninth Circuit that either are or may be the subject of petitions for certiorari. Pet. 16-18. The petitions in one of the three cases have been denied, so Petitioner's reliance on that case has become moot. *Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006 (9th Cir. 2006), *cert. denied sub nom. Coral Power v. Cal. ex rel.*

Brown, 2007 WL 1730909, 75 U.S.L.W. 3355, 75 U.S.L.W. 3676, 75 U.S.L.W. 3678 (U.S. June 18, 2007) and *cert. denied on conditional cross-petition sub nom. Cal. ex rel. Brown v. Coral Power*, 2007 WL 435722, 75 U.S.L.W. 3410, 75 U.S.L.W. 3676, 75 U.S.L.W. 3678 (U.S. June 18, 2007). With respect to the remaining two cases, there is no connection between those cases and this one.

The two remaining cases to which Petitioner refers are companion cases involving FERC's regulation of wholesale electric transactions under authorizations for sellers to transact at negotiated, market-based rates. *Pub. Util. Dist. No. 1 of Snohomish County, Wash. v. FERC*, 471 F.3d 1053 (9th Cir. 2006) ("*P.U.D.*"), and *Pub. Utils. Comm'n of Calif. v. FERC*, 474 F.3d 587 (9th Cir. 2006) ("*P.U.C.*"), both involve the application to such market-based wholesale transactions of the "*Mobile-Sierra* doctrine,"[3] which precludes FERC from overriding a negotiated term in a fixed rate wholesale contract unless it finds the term to be contrary to the public interest. *See P.U.D.* at 1059-60; *P.U.C.* at 590. The Ninth Circuit held, among other things, that a negotiated, market-based contract is entitled to limited review under the *Mobile-Sierra* standard only if FERC had previously reviewed the contract for justness and reasonableness. *P.U.D.* at 1061, 1079-81.

The decision below does not present any of the issues decided in these cases. The CTC Formula is not a negotiated, market-based rate, such as those at issue

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[3] *See Federal Power Comm'n v. Sierra Pac. Power Co.*, 350 U.S. 348 (1956); *United Gas Pipe Line Co. v. Mobile Gas Serv. Corp.*, 350 U.S. 332 (1956).

in the Ninth Circuit decisions, and the court below had no occasion to address the *Mobile-Sierra* doctrine.[4] Moreover, as explained above, FERC *did* review the CTC Formula rate under the FPA's just and reasonable standard in 1998, explicitly found it to be "reasonable," and on that basis accepted it over Petitioner's objections. Pet.App. 280a. The First Circuit denied Norwood's challenge to that decision in *Norwood I*. Pet.App. 242a-43a. In the decision below, the court held that Petitioner's reformulated attack on the consistency of the CTC Formula rate and the resulting termination charge with the just and reasonable standard was foreclosed by FERC's acceptance of the CTC Formula rate eight years earlier. Pet.App. 10a. Neither of the Ninth Circuit decisions presents any issue touching on the correctness of this ruling.

4. There is no merit to Petitioner's contention that the decision below allowed FERC to shirk its duty to establish just and reasonable termination charges. Pet. 25-30. As explained above, it simply is not true that the CTC charges were "never . . . examined for their consistency with statutory norms." Pet. 25. FERC conducted such an examination in the 1998 proceeding, in which it explicitly found the tariff amendment containing the CTC Formula rate to be "reasonable," as

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[4] At an earlier stage of this litigation, Norwood argued that NEP's tariff amendment violated the *Mobile-Sierra* doctrine. The First Circuit rejected this argument in *Norwood I*, Pet.App. 240a-241a, and, on that basis, FERC barred Norwood from renewing it in this round of the litigation. Pet.App. 65a. Norwood did not challenge this ruling on appeal, so it was not addressed in the decision below.

section 205 of the FPA requires, and rejected Petitioner's arguments to the contrary. Pet.App. 280a. The decision below found simply that only one such examination is required and Petitioner is not entitled to bring successive, unending challenges to the reasonableness of the charge produced by the CTC Formula rate. Pet.App. 10a-13a.

Nor is Norwood correct that the decision below authorized the collection of a CTC that is not based on NEP's costs. Pet. 27-29. The CTC Formula rate accepted by FERC ensures that the CTC *is* based on NEP's costs. Specifically, the CTC is based on the costs NEP projected it would incur to meet its obligation to supply power to Norwood through at least 2008, as those cost projections were reflected in NEP's approved rates in effect at the time Norwood decided to terminate service early. The First Circuit recognized that the CTC Formula rate relied on cost projections in NEP's existing rates when it described the CTC in *Norwood I* as "a formula-driven charge to cover certain projected losses to [NEP] caused by *not* supplying electricity after preparing to do so, calculated based on rates already approved by FERC." Pet.App. 242a (emphasis in original).

Petitioner's real complaint goes to *how* the CTC Formula rate measures NEP's costs. But even if this issue were not foreclosed by *res judicata,* Petitioner's contention that the Act's "just and reasonable" standard precludes FERC from accepting a CTC based on cost projections (Pet. 28) is unfounded and insubstantial. FERC's acceptance of the CTC Formula rate's reliance on cost projections, as embodied in

NEP's approved rates, was well within the Commission's broad discretion to select the methodology through which the relationship between jurisdictional rates and costs is assessed. *See In re Permian Basin Area Rate Cases*, 390 U.S. 747, 766-67 (1968). The CTC Formula rate's reliance on projections of costs and market values made at the time of termination was consistent with FERC's acceptance of a similar approach in its generic rule allowing wholesalers, in certain circumstances, to recover costs stranded by a customer's unexpected decision not to renew its contract.[5] It is also consistent with FERC's settled practice, embodied in its regulations, of using cost projections to set rates for wholesale electric rates. 18 C.F.R. § 35.13(d)(2) (2006); *see also Indiana & Michigan Mun. Dist. Ass'n v. FERC*, 659 F.2d 1193, 1198 (D.C. Cir. 1981) ("the Commission rightly does not require that history prove the accuracy of the utilities' estimates, but rather that the utility prove that the estimates were reasonable when made").

To the extent it has any relevance, Petitioner's repeated complaint that the decision below permitted NEP to collect a CTC that bore no relation to the losses

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[5] *Promoting Wholesale Competition Through Nondiscriminatory Transmission Services by Public Utilities*, Order No. 888, 61 Fed. Reg. 21,540, 21,659 (May 10, 1996), *aff'd Transmission Access Policy Study Group v. FERC*, 225 F.3d 667 (D.C. Cir. 2000) (per curiam), *aff'd sub nom. New York v. FERC*, 535 U.S. 1 (2002). This rule was not directly applicable to the CTC at issue in this case because the CTC Formula rate calculates a termination charge only on the basis of the revenues foregone during the remaining term of the customer's contract, not during any assumed extension or renewal. Pet.App. 281a.

it suffered when Norwood terminated service with over ten years left on its contract is also invalid. Pet. 3, 10, 17. The CTC was directly and explicitly based on a projection of NEP's losses: the revenues that NEP would have received under the approved tariff rates had Norwood honored its contract, which NEP relinquished by acceding to Norwood's premature termination, reduced by what NEP could have expected to receive by reselling the electricity at market prices. Pet.App. 49a, 280a. As the court below stated, "There is nothing obviously unreasonable about framing a charge for contract termination that approximates, as of the time of termination, projected revenues promised by the buyer less projected avoided losses for the seller." Pet.App. 13a.

Petitioner argues in a footnote that NEP's approved rates overstated NEP's costs at the time Norwood terminated (Pet. 4 n.3), but FERC found this argument unpersuasive when Norwood presented it the first time in the 1998 proceeding on the CTC Formula. Pet.App. 274a, Supp.App. 5a-6a. Petitioner could have forced the issue by bringing a complaint under section 206 of the FPA, 16 U.S.C. § 824e, to reduce NEP's rates before terminating its purchases (which, if successful, would have reduced the CTC due under the CTC Formula rate). But it chose not to do so. Pet.App. 164a. In these circumstances, neither Petitioner's dissatisfaction with the result, nor the ruling below that Petitioner was not entitled to another opportunity to challenge the reasonableness of the CTC Formula's reliance on NEP's approved rates, presents an issue meriting further review.

5. Finally, Petitioner's assertion that the decision below causes it severe financial harm does not support its petition. Pet. 30. As the court below noted, the financial obligations arising from Petitioner's decision to opt out of its contract with NEP "are the product of Norwood's own choices." Pet.App. 13a; *see also* Pet.App. 110a. Moreover, while Petitioner complains here that the obligation to pay the CTC for which it became liable when it terminated the contract places an intolerable and inordinate financial burden on its customers (Pet. 16, 30), its managers painted a different picture for those same customers during the course of the litigation. They told customers that even if Norwood were required to pay the CTC due under NEP's FERC-approved tariff, their bills for electric service would still be much lower than those of their neighbors and Norwood would still have saved money by terminating its NEP contract early. JA 952-53.[6] Having told its customers that the risk of having to pay the CTC to NEP was worth running and that the burden of the CTC obligation if it lost is manageable, Petitioner cannot seek review in this Court by claiming the opposite.

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[6] Petitioner's managers repeated the substance of this claim after the issuance of the decision below. *See* "Lights out for Norwood Power Suit," Daily News Transcript (Feb. 9, 2007), available at www.dailynewstranscript.com/homepage/8998945291348475903 (quoting Norwood's Light Department Superintendent, "I know the numbers look like horrible, scary numbers, but when you look at what we would have paid all along and what we're going to have to pay now, we're better off").

CONCLUSION

The Petition should be denied.

Respectfully submitted,

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APPENDIX

SUPPLEMENTAL APPENDIX

Excerpts From the Request for Rehearing of the Town of Norwood, Massachusetts, Filed June 15, 1998, in FERC Docket No. ER98-2233

UNITED STATES OF AMERICA
BEFORE THE
FEDERAL ENERGY REGULATORY COMMISSSION

In the Matter of:	)	
	)	
	)	
	)	
NEW ENGLAND	)	Docket No. ER98-2233-000
POWER COMPANY	)	

REQUEST FOR REHEARING OF THE
TOWN OF NORWOOD, MASSACHUSETTS

Pursuant to Section 313(a) of the Federal Power Act, 16 U.S.C. § 825*l*(a), and Rule 713 of the Commission's Rules of Practice and Procedure, 18 C.F.R. § 385.713 (1997), the Town of Norwood, Massachusetts ("Norwood" or "Town") hereby requests rehearing of the Commission's Order dated May 15, 1998 in *New England Power Company*, Docket No. ER98-2233-000, 83 FERC ¶ 61,174.

* * *

If the Commission denies Norwood's request for rehearing that NEP's proposed amendment be rejected or not applied to Norwood, Norwood requests the Commission to suspend the proposed amendment (as well as the proposed stranded costs to Norwood) at least for the full five-month period, and establish a hearing under Section 205 of the Federal Power Act to determine whether the proposed amendment is just and reasonable, and, further, whether NEP's proposed stranded cost charge to Norwood is just and reasonable. Norwood also requests that the Commission hold this case and related charges in abeyance pending the litigation before the United States District Court for the District of Massachusetts.

Suspension of the proposed amendment and of the proposed stranded cost charges to Norwood is appropriate in this case. First, the Commission in its May 15, 1998 Order did not find that NEP's proposed stranded costs to be charged to Norwood were just and reasonable, apparently relying on its erroneous conclusion that Norwood did not request a hearing. As noted above, however, the Commission's belief that Norwood did not request a hearing was misplaced.

NEP has not demonstrated in its abbreviated filing that (1) the methodology contained in its proposed amendment is just and reasonable, particularly in relation to the stranded costs charged in its settlement with its affiliated wholesale customers in

Docket No. ER970678-000 and ER98-680-000[1] and (2) that NEP's estimates and calculations under the Order No. 888 lost revenues methodology are adequately supported in order to be found just and reasonable. For example, NEP seeks to recover approximately $52.6 million (in present dollars)[2] from Norwood under its proposed methodology in this case. However, Norwood's share under the settlement between NEP and its affiliates in Docket Nos. ER97-678-000 and ER97-680-000 would be approximately $42.3 million.[3] NEP's filing, however, does not explain this substantial difference in stranded costs (CTC).

Further, NEP proposes in this case to use the "lost revenues" approach under Order No. 888.[4] Assuming, *arguendo*, that NEP may simultaneously claim on the one hand it is not seeking wholesale stranded costs under Order No. 888 and then use the prescribed methodology to recover such costs, NEP failed to provide the detail required by the Commission under Order No. 888 (as well as the

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1 *New England Power Company*, 81 FERC ¶ 61,281 (1997), *order denying reh'g*, 83 FERC ¶ 61,265 (1998).

2 *See* Exhibit E, Attachment A at p. 1. The full amount exceeds $78 million during the period.

3 *See* Affidavit of Robert G. Towers (attached hereto and to "Supplement to Motion to Reject of the Town of Norwood"), filed on April 16, 1998, p. 3, ¶ 8.

4 Transmittal Letter at 2. Under the "lost revenues" approach, the stranded cost obligation ("SCO") is determined by subtracting the competitive market value estimate ("CMVE") from the expected revenue stream estimate ("RSE") and multiplying by the expected years of lost service.

Commission's regulations under Section 205). In Order 888, the Commission required estimates to be supported in detail with all of the assumptions and workpapers included to support the proposed costs. *See* Order No. 888, FERC Stats. and Regs. ¶ 30,036 at 31,841-31,842 (1996). NEP failed to provide the necessary detail in order for Norwood (and the Commission) to determine whether NEP's proposed costs are reasonable. In particular, Order No. 888 provides that

> A utility requesting stranded cost recovery must estimate CMVE [competitive market value estimate] based on a market analysis, with all assumptions and work papers made available to the departing generation customers.

Order 888 at 31,841. The competitive market values provided by NEP in Schedule II C are not supported by any detail, however, and NEP failed to provide the relevant assumptions and work papers. Schedule II C merely states estimated market rates.

Similarly, NEP does not explain or support its use of discount rate of 8.00 percent to calculate the net present value of its estimated stranded costs. NEP's proposed amendment specifies that the discount rate shall be the Commission-promulgated interest rate on refunds on the "termination date" of service; this rate is defined in Section 35.19 of the Commission's regulations, 18 CRR §35.19. This rate changes quarterly, however, and for both the first and second

quarter of 1998, the rate was 8.50 percent. According to NEP's own filing, this means that the wrong discount rate was used, which in turn means that under the "revenues lost" formula the present value of the difference between "R" (revenues "lost") and "M" (the value of the released capacity and energy) is overstated because the wrong discount has been used. NEP's filing, however, fails to explain these discrepancies.

NEP also appears to have overstated revenue stream estimate ("RSE") under the lost revenues approach. NEP provided service to Norwood under Rate W-95(N), which included both generation and transmission services rate. Norwood is interconnected with Boston Edison Company's transmission system, and having terminated service, Norwood is no longer a transmission customer of NEP. While NEP makes a reduction for transmission related to Boston Edison Company and the New York Power Authority ($1,117,328)[5], NEP fails to make an adjustment for transmission costs in its bundled rates. In recent monthly bills sent by NEP to Norwood, NEP showed "for informational purposes" (pursuant to the Commission's open access orders) an unbundled transmission component that approximated $80,000 - $90,000 per month or approximately $1,000,000 on an annual basis. In addition, in a response to a Staff data request in Docket Nos. ER970678-000 and ER97-680-000, NEP showed the transmission cost applicable to

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5 Exhibit E, Attachment A at pp. 1, 4 & 5.

Norwood for 1997 to be $1,301,185.[6] Under the revenues lost formula in Order No. 888, the Commission has emphasized that stranded costs should reflect generation costs and not transmission cost, particularly since NEP will recover its share of transmission cost under open access transmission tariffs. Order No. 888 at ¶ 31,839. Reflecting this adjustment over the life of the claimed stranded cost period would result in a substantial reduction of approximately $10,000,000.

It also appears that the W-95 rate upon which NEP bases its computation is excessive. NEP's most recent earnings reports show that NEP has an earned equity return of 16.03% under the W-95 rate as opposed to a more reasonable rate of return of between 9.2% and 12.0% in recent Commission decisions.[7] Order 888 uses "present rates" because the fact that such rates have been approved "strongly suggests" that they are "prudent, legitimate and verifiable." Order No. 888 at 31,841. However, in this instance the strong suggestion that the rates are reasonable is overcome by the fact that the "present rates" are demonstrably excessive and should be reduced.

NEP's proposed stranded cost charge is also excessive when compared to NEP's previous rate under

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[6] *See* Affidavit of Robert G. Towers, Exhibit A, page 3 of 4, filed April 16, 1998).

[7] *See, e.g., Puget Sound Energy, Inc.*, 81 FERC ¶ 61,368 (1997) (proposed return of 11.75%); *Boston Edison Co.*, 77 FERC ¶ 61,272 (1996) (return of 10.71% found reasonable).

w-95(N) to Norwood. As Norwood's witness Robert G. Towers demonstrates in Exhibit A to his affidavit attached hereto, when NEP's proposed contract termination charge ($615,674 per month for 127 months, or $7,388,088 per year) is combined with the charges to Norwood from its contract with Northeast Utilities, the power costs to Norwood through October 2008 (excluding transmission costs) are *$15 million higher* than the generation-related portion of its power costs calculated at NEP's former Rate W-95(N) to Norwood.[8] This also demonstrates that NEP's proposed stranded cost charges are excessive, unjustified and unreasonable.

Finally, the combination of NEP's proposed stranded cost rate to Norwood above the Rate W-95(N) and its lower rates to its affiliate Mass Electric discriminates unduly against Norwood in violation of Section 205. While NEP's proposed stranded costs in this case unjustifiably increases Norwood's power costs above the previously existing W-95(N) rate (as shown above), at the same time NEP has reduced its rates to its similarly situated affiliates (Mass Electric) by 28%.[9] Adjusting NEP's proposed stranded costs in this case to reflect comparable treatment would reduce Norwood's power costs by approximately $5.6 million.[10]

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[8] *See* Affidavit of Robert G. Towers dated April 16, 1998, p. 5, 11.

[9] *See* Affidavit of Robert G. Towers dated April 16, 1998, p. 6, ¶ 15.

[10] *See* Affidavit of Robert G. Towers dated April 16, 1998, p. 6, ¶ 15.

Moreover, for the same period covered by Standard Offer Service to Massachusetts Electric Co. (through the year 2004), the cost of power to Norwood at the generation-related portion of Rate W-95(N) would be $20.5 million greater than the cost of power at the generation-related rates that the Commission has approved for NEP to charge to Mass Elec.[11] The cost of power to Massachusetts Electric Company *includes both* sum of the Standard Offer rate *and* the Contract Termination Charges to Massachusetts Electric Company.[12] NEP's proposed stranded costs to Norwood are excessive and unduly discriminatory under any reasonable standard and should, if not rejected, be set for hearing.

Accordingly, if NEP's proposed amendment is not rejected, the Commission should establish a hearing to determine if NEP's stranded cost estimates and calculations are just and reasonable similar to other cases addressing the reasonableness of stranded cost estimates based on the revenues lost formula. *See, e.g., City of Las Cruces, New Mexico,* 80 FERC ¶ 61,265 (1997); *and Boroughs of Lansdale, et al.,* 77 FERC ¶ 61,045 (1996).

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[11] Affidavit of Robert G. Towers dated April 16, 1998, pp. 6-7, ¶ 15.

[12] Affidavit of Robert G. Towers dated April 16, 1998, pp. 6-7, ¶ 15.

No. 06-1470

In the Supreme Court of the United States

TOWN OF NORWOOD, MASSACHUSETTS,
PETITIONER

v.

FEDERAL ENERGY REGULATORY COMMISSION

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether the court of appeals erred in holding that petitioner, a wholesale municipal electricity customer, was precluded from raising additional objections to a formula for calculating a contract termination charge that both the Federal Energy Regulatory Commission and the First Circuit had sustained during a previous proceeding also initiated by petitioner.

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In the Supreme Court of the United States

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TOWN OF NORWOOD, MASSACHUSETTS,
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BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-19a) is reported at 476 F.3d 18. The orders of the Federal Energy Regulatory Commission (Pet. App. 20a-66a, 67a-94a, 95a-111a, 112a-126a) are reported at 104 F.E.R.C. ¶ 61,030, 112 F.E.R.C. ¶ 61,099, 114 F.E.R.C. ¶ 61,187, and 115 F.E.R.C. ¶ 61,396, respectively.

JURISDICTION

The judgment of the court of appeals was entered on February 2, 2007. The petition for a writ of certiorari was filed on May 3, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Section 201 of the Federal Power Act (FPA), 16 U.S.C. 824, gives the Federal Energy Regulatory Commission (Commission or FERC) jurisdiction over the "transmission of electric energy in interstate commerce" and the "sale of electric energy at wholesale in interstate commerce." 16 U.S.C. 824(b)(1). All proposed rates for or in connection with jurisdictional sales and transmission services are subject to FERC review to ensure that they are not unjust, unreasonable, unduly discriminatory, or preferential. FPA § 205, 16 U.S.C. 824d. Complaints asserting that existing rates are unjust or unreasonable are governed by FPA § 206, 16 U.S.C. 824e. If, after a hearing on its own motion or on complaint, FERC determines that any existing rate or charge is unjust or unreasonable, it must determine and fix by order the just and reasonable rate or charge "to be thereafter observed and in force." FPA § 206(a), 16 U.S.C. 824e(a).

2. Petitioner Town of Norwood operates a municipal electric system that serves local businesses and residents. In 1983, petitioner and New England Power Company entered into a long-term requirements contract that required petitioner to purchase, and New England Power to supply, all of petitioner's wholesale power requirements at the rates set forth in New England Power's Tariff No. 1. Pet. App. 2a. The contract provided that it could be terminated by petitioner without penalty, but only upon seven years' notice. *Ibid.* In 1990, petitioner notified New England Power that it was voluntarily extending its contract through 2008. See

Town of Norwood, 87 F.E.R.C. ¶ 61,341, at 62,318 (1999).[1]

In 1996, the Commission adopted FERC Order No. 888, which directed public utilities subject to FERC jurisdiction to offer non-discriminatory, open-access transmission service.[2] To implement that directive, the Commission ordered the functional unbundling of wholesale generation and transmission services, requiring each utility to state separate rates for its wholesale generation, transmission, and ancillary services. See *New York* v. *FERC*, 535 U.S. 1, 11 (2002); see also *id.* at 19-20 (sustaining validity of Order No. 888).

New England Power made a number of regulatory filings as a result of Order No. 888. It sought Commission approval to divest its non-nuclear generating facilities. Pet. App. 3a. New England Power also proposed to offer settlements to both its affiliated and non-affiliated distributor customers that would permit those customers to terminate their requirements contracts earlier than would otherwise have been permitted, upon

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[1] In 1999, petitioner asked FERC to declare that its 1990 extension of its contract had been ineffective based on certain filing infirmities. FERC denied this request, see *Town of Norwood*, 87 F.E.R.C. ¶ 61,341 (1999), and its decision was affirmed by the First Circuit, see *Town of Norwood* v. *FERC*, 217 F.3d 24 (2000), cert. denied, 532 U.S. 993 (2001).

[2] See *Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities*, 61 Fed. Reg. 21,540 (Order No. 888), clarified, 76 F.E.R.C. ¶ 61,009 and ¶ 61,347, order on reh'g, 62 Fed. Reg. 12,274 (1996) (Order No. 888-A), order on reh'g, 62 Fed. Reg. 64,688 (1997) (Order No. 888-B), order on reh'g, 82 F.E.R.C. ¶ 61,046 (1998) (Order No. 888-C), aff'd *sub nom. Transmission Access Policy Study Group* v. *FERC*, 225 F.3d 667 (D.C. Cir. 2000), aff'd *sub nom. New York* v. *FERC*, 535 U.S. 1 (2002).

payment of a contract termination charge. *Id.* at 2a.[3] Over petitioner's objections, the Commission approved both the divestiture and the settlement offers. *Id.* at 3a.[4]

Three of New England Power's affiliated customers and three of its unaffiliated customers accepted the settlement offers and paid the corresponding contract termination charges. Pet. App. 3a. Other non-affiliated customers opted to continue receiving their power requirements from New England Power at the rates specified in Tariff No. 1 through the contract-specified seven-year termination period. *Ibid.*

Petitioner, a non-affiliated customer, sought to decline both options. Instead, on March 4, 1998, it informed New England Power that it would be terminating its contract effective April 1, 1998, and that it would thereafter obtain its wholesale power from a different utility. Pet. App. 3a-4a, 131a.

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[3] The settlements offered to non-affiliated customers like petitioner were similar, though not identical, to those offered to New England Power's affiliated customers. As the court of appeals explained, New England Power offered to provide its affiliated customers with "low (but gradually escalating) 'wholesale standard offer' rates for power without the need for a contract." Pet. App. 3a. Those standard offer rates were designed to "interlock[] with schedules of *retail* standard offer rates that New England Power's affiliates ha[d] agreed, in settlements with their respective state commissions, to offer as a safeguard for retail customers who do not or cannot immediately take advantage of the competitive sources of retail supply that * * * regulators foresee developing." *Id.* at 245a-246a.

[4] See *New England Power Co.*, 78 F.E.R.C. ¶ 61,080 (1997); *New England Power Co.*, 80 F.E.R.C. ¶ 63,003 (1997); *New England Power Co.*, 81 F.E.R.C. ¶ 61,281 (1997), reh'g denied, 83 F.E.R.C. ¶ 61,265 (1998); *New England Power Co.*, 82 F.E.R.C. ¶ 61,179 (1998).

In response, on March 18, 1998, New England Power filed an amendment to Tariff No. 1 (March 18 amendment). Under the amendment, any of New England Power's remaining distributor customers—including petitioner—would have the right to terminate their requirements contracts upon 30 days' notice and payment of a specified contract termination charge (CTC). Under the tariff amendment, a distributor's CTC was to be calculated using a formula designed to enable New England Power to recover the revenues it would have collected had the terminating customer continued to pay the tariff rate through the end of the contract term, less the expected costs avoided by not providing service. See Pet. App. 4a-5a & n.4.[5] As the court of appeals noted, "[t]his CTC [formula] was in several respects less favorable than the contract termination charge applied to" customers that had accepted New England Power's initial settlement offer. *Id.* at 5a.

In proceedings before the Commission, petitioner objected to the March 18 amendment on numerous grounds and also requested a hearing on the reasonableness of its own CTC amount (which petitioner itself estimated would total $78 million). Pet. App. 5a. The Commission rejected petitioner's claims and accepted the March 18 amendment as "reasonable," *id.* at 277a-284a,[6] and on rehearing refused to conduct an eviden-

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[5] In its simplest expression, the CTC formula is $(R\text{-}M) \times L$, where R equals annual revenues under the sales contract, M equals the market value of the released power, and L equals the length of the contract term remaining after termination. The CTC was also capped so as not to exceed the terminating customer's contribution to New England Power's fixed power supply costs. See Pet. App. 4a-5a & n.4.

[6] Pet. App. 277a-284a.

tiary hearing because "no party [had] raised any issue of material fact,"[7] *id.* at 6a (brackets in original).

Petitioner then sought review in the court of appeals of the Commission's orders upholding the March 18 amendment. Pet. App. 231a-255a (*Norwood I*). In an unanimous opinion by then-Judge Boudin, the First Circuit denied the petition for review, holding, *inter alia*, that FERC's actions had not conflicted with either the "*Mobile-Sierra* doctrine,"[8] *id.* at 240a-241a, or the filed rate doctrine, *id.* at 241a-242a, and that New England Power had not acted unfairly in imposing a higher termination charge on distributers—like petitioner—that had rejected its initial settlement offer, *id.* at 243a-245a.

Finally, and most pertinent here, the court of appeals also rejected petitioner's assertion that the CTC it would be charged under the March 18 amendment—which petitioner once again estimated at $78 million—was not "just and reasonable" for purposes of the FPA. Pet. App. 242a. "[T]he termination charge," the court of appeals stressed, "is not a new or increased *rate* for supplying energy," but rather "a formula-driven charge to cover certain projected losses to New England Power caused by *not* supplying electricity after preparing to do so, calculated based on rates already approved by FERC." *Ibid.* (first emphasis added). The court of appeals acknowledged that petitioner "might well have a legitimate objection" if the charges under the formula "were miscomputed or unsupported," but it stressed that petitioner had not "explained any such objection to

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[7] Pet. App. 272a-276a.

[8] See *FPC* v. *Sierra Pac. Power Co.*, 350 U.S. 348, 354-355 (1956), and *United Gas Pipe Line Co.* v. *Mobile Gas Serv. Corp.*, 350 U.S. 332, 344 (1956).

us" and noted that petitioner could "presumably" still file a complaint with FERC "[t]o whatever extent there was in fact a disputed issue regarding the termination charge calculation that necessitated a hearing." *Id.* at 242a-243a.[9] This Court denied certiorari. 531 U.S. 818 (2000).

Despite FERC's approval of the CTC formula set forth in the March 18 amendment, petitioner refused to make the payments due under the tariff. After a Massachusetts state court granted summary judgment in favor of New England Power in a breach of contract collection action,[10] petitioner filed the complaint that forms the basis of this petition for a writ of certiorari.

3. On December 23, 2002, petitioner filed with the Commission a 13-claim complaint against New England Power, alleging that the CTC imposed pursuant to the March 18 amendment had been unjust, unreasonable, unduly discriminatory, preferential, or otherwise unlawful. Pet. App. 117a-119a.

On July 2, 2003, FERC summarily dismissed eight of these claims on the ground that they had already been

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[9] *Norwood I* also considered and rejected various challenges to the affiliate settlement agreements and New England Power's asset sale. Pet. App. 245a-247a, 250a-255a.

[10] *New England Power Co.* v. *Town of Norwood*, No. 982650A, 2001 WL 292974 (Mass. Super. Ct. Feb. 8, 2001); *New England Power Co.* v. *Town of Norwood*, No. 982650A, 2001 WL 543172 (Mass. Super. Ct. Mar. 14, 2001). Petitioner unsuccessfully appealed this ruling through the state system, see *New England Power Co.* v. *Town of Norwood*, 797 N.E.2d 26 (Mass. App. Ct.) (Table), petition for further review denied, 799 N.E.2d 594 (Mass. 2003)(Table), and this Court denied certiorari, 541 U.S. 1073 (2004). Petitioner later sought relief from that judgment, which was also denied. *New England Power Co.* v. *Town of Norwood*, 847 N.E.2d 366 (Mass. App. Ct.), petition for further review denied, 850 N.E.2d 584 (Mass. 2006) (Table).

"conclusively adjudicated" by the Commission and the courts. Pet. App. 121a-123a. The Commission set the remaining five claims for hearing, concluding that they at least facially related to the implementation and calculation of the CTC formula rather than the validity of the CTC formula itself. *Id.* at 120a-121a.

On June 22, 2005, after a hearing before an administrative law judge, the Commission denied petitioner's complaint, finding that New England Power had correctly applied the CTC formula set forth in the March 18 amendment. Pet. App. 24a-66a.

On February 22, 2006, the Commission denied petitioner's request for rehearing. Pet. App. 92a. Much of the request, the Commission wrote, was "simply a collateral attack" (*id.* at 80a) on the First Circuit's approval of the CTC formula in *Norwood I*, and it concluded that those portions of petitioner's request that challenged the administrative law judge's application of that formula lacked merit (*id.* at 83a-85a). The Commission calculated that petitioner owed New England Power $71,881,517 in CTC payments, plus interest. *Id.* at 65a.

On June 30, 2006, the Commission denied petitioner's further request for rehearing and for a stay pending further appeal. Pet. App. 95a-111a.

4. In another unanimous opinion by now-Chief Judge Boudin, the First Circuit affirmed the Commission's orders in relevant part. Pet. App. 1a-19a.[11] "To the extent that [petitioner] purports to interpret the *language* of the CTC tariff amendment," the court of

[11] The court of appeals remanded for the limited purpose of further proceedings regarding the proper calculation of the late payment interest rate. Pet. App. 13a-19a.

appeals concluded, "its arguments are properly before us but fail on the merits." *Id.* at 8a-9a; see *ibid.* (rejecting petitioner's arguments regarding proper calculation of the "R and M values"); see also note 5, *supra* (describing formula).

"However, the main thrust of [petitioner's] position on appeal," the court of appeals continued, "[was] that the CTC formula, as FERC reads it, [was] unlawful under the statute." Pet. App. 10a. Like the Commission before it, the court of appeals declined to address petitioner's unreasonableness arguments on the merits, holding that they were precluded as a result of petitioner's initial unsuccessful challenge to the March 18 amendment.

The court of appeals began by noting that "res judicata doctrine applies to agencies when they are acting in an adjudicative capacity to resolve a controversy between two parties." Pet. App. 11a. "Here and in the prior proceeding in which [petitioner] sought rejection of the CTC tariff," it continued, "the parties are the same and, so far as [petitioner] contests the validity of the CTC formula, the subject matter is the same." *Ibid.* Specifically rejecting petitioner's argument that its decision in *Norwood I* had left open the possibility of the sort of challenges petitioner seeks to raise here, the court of appeals stressed that what it had actually left open "was the proper computation of the R and M values *according to the formula*—not new attacks on the formula itself." *Ibid.* The First Circuit acknowledged that "a rate that was once reasonable may, in light of changed circumstances, become unreasonable." *Id.* at 12a (citing *Tesoro Alaska Petroleum Co.* v. *FERC*, 234 F.3d 1286, 1290 (D.C. Cir. 2000)). But, the court of appeals continued, the CTC "is not a *rate*; it is 'a formula

driven charge . . . calculated based on rates already approved by FERC'" that "became a fixed and final contractual obligation at the time of termination," and the court of appeals saw "nothing in the statute or case law cited by [petitioner] that prevents the construction of [a] termination charge based on rates in effect as of a certain date." Pet. App. 12a (quoting *id.* at 242a). Although petitioner had been free in the original proceeding to argue "that the tariff rates to be incorporated by the CTC were unreasonably high in light of what was known then about [New England Power's] costs" or otherwise to "contest the CTC terms as unlawful," the court of appeals stressed that what petitioner "could not do was to defer some of the available attacks on the CTC formula and now raise them in court for the first time eight years later." *Id.* at 12a-13a.

Having concluded that petitioner was claim-precluded from raising further attacks on the CTC formula, the court of appeals also stated that petitioner "would not likely have prevailed even if the merits were open." Pet. App. 13a; see *id.* at 10a (similar). The reasonableness of the way in which the CTC was calculated, it stressed, "is a regulatory issue within the province of FERC and reviewed by a court only for arbitrariness," and the court stated that it saw "nothing obviously unreasonable about framing a charge for contract termination that approximates, *as of the time of termination*, projected revenues promised by the buyer less projected avoided loss for the seller." *Id.* at 13a (emphasis added).

ARGUMENT

In separately framed questions, petitioner asks this Court to grant review to consider: (1) the reasonable-

ness of the CTC imposed upon it pursuant to the March 18 amendment; and (2) the court of appeals' determination that principles of claim preclusion barred further attacks on the CTC formula. Pet. i. As the court of appeals' unanimous opinion makes plain, however, this Court could not reach the merits questions petitioner seeks to litigate without first reaching and reversing as to the claim preclusion issue. Petitioner does not allege that the court of appeals' claim preclusion holding implicates any pertinent split in lower court authority, and that court's application of preclusion principles to the particular facts of this case was entirely correct. Further review is not warranted.

1. As petitioner acknowledges (Pet. 19), the court of appeals' affirmance of the Commission's orders was based in large measure on its conclusion that petitioner was barred under principles of claim preclusion from launching further attacks on the CTC formula set forth in the March 1998 amendment.[12] Accordingly, because "this Court reviews judgments, not opinions," *Chevron U.S.A. Inc.* v. *NRDC*, 467 U.S. 837, 842 (1984), there would be no way for this Court to reach petitioner's attacks on either the substance of the formula or the manner in which FERC approved it (Pet. 16-19, 25-30) without first granting review and reversing with respect to the First Circuit's claim preclusion holding.

2. Petitioner does not seriously assert that the court of appeals' claim preclusion holding implicates any per-

[12] As noted earlier (pp. 8-9, *supra*), the First Circuit also rejected two arguments that petitioner raised regarding the determination of "the R and M values" under the CTC formula. Pet. App. 8a-9a. Petitioner does not appear to be renewing those claims before this Court, and, even if it were, such factbound issues would not merit this Court's review.

tinent split in lower court authority, and its arguments against that holding consist of little more than case-specific challenges that the unanimous panel rejected. Although petitioner suggests (Pet. 24) that the First Circuit's preclusion holding "stands in direct contrast to" the Ninth Circuit's decisions in *Public Utilities District No. 1* v. *FERC*, 471 F.3d 1053 (2006), petition for cert. pending, No. 06-1457 (filed May 3, 2007) (*PUD*), and *Public Utilities Commission* v. *FERC*, 474 F.3d 587 (2006), petition for cert. pending, No. 06-1454 (filed May 3, 2007) (*PUC*), neither of these decisions involved—or even discussed—any issues regarding preclusion.

Nor has the court of appeals so far departed from standard claim preclusion principles as to warrant this Court's intervention in the absence of any conflict. To the contrary, the court of appeals correctly applied settled preclusion principles. The court of appeals acknowledged the principle for which petitioner invokes *Tagg Brothers & Moorehead* v. *United States*, 280 U.S. 420, 445 (1930) (Pet. 23)—*viz.*, that "*rate orders* are not subject to the rules of res judicata" because "a rate that was once reasonable may, in light of changed circumstances, become unreasonable" (Pet. App. 12a (emphasis added)). But, as the court of appeals noted (*ibid.*), the CTC at issue in this case "is not a *rate*" that may become unreasonable over time; rather, it is a one-time *charge* that "became a fixed and final contractual obligation at the time of termination." In addition, neither FERC nor the court of appeals denied that preclusion principles do not apply in situations where a litigant's entitlement to maintain a second action has been appropriately preserved. Pet. 20. Instead, both the agency (Pet. App. 86a) and the court (*id.* at 11a) held the arguments petitioner sought to raise in the present proceed-

ings did not fall within the scope of the reservations contained in their earlier decisions. Petitioner obviously disagrees with that assessment (Pet. 20-22), but these sort of factbound determinations do not warrant this Court's review.

In any event, the court of appeals' application of preclusion principles in the circumstances of this case was both sensible and correct. As the court of appeals noted (Pet. App. 12a), petitioner could have—and thus, under standard claim preclusion principles, should have—raised any and all arguments against the CTC formula in its challenge to the March 18 amendment. Having failed to raise "some of the available attacks on the CTC formula" at the appropriate time, petitioner may not "now raise them in court for the first time eight years later." *Id.* at 13a. Indeed, as the First Circuit cogently explained, if the court were to have permitted "this kind of hide and seek litigation tactic, nothing would prevent [petitioner] from filing tomorrow a *new* section 206 attack to present *new* arguments as to why the original CTC formula was unlawful." *Ibid.*

3. Moreover, this Court's review would not be warranted even absent the court of appeals' claim preclusion holding. Two of the three Ninth Circuit decisions with which petitioner asserts the decision below conflicts (Pet. 14, 16-19) involved the reasonableness of rates under still-existing contracts.[13] But again, as the court of appeals explained, the CTC at issue in this case "is not a *rate*," but rather a "'formula driven charge . . . calculated based on rates already approved by FERC,' * * * payment of which permitted [peti-

[13] See *PUC*, 474 F.3d at 592 (noting case involved request to modify existing contracts); *PUD*, 471 F.3d at 1057 (same).

tioner] to opt out of a contract before it had run its course." Pet. App. 12a (quoting *id.* at 242a); see Pet. 14 (acknowledging that this petition for a writ of certiorari does not present "the issue whether FERC may upset existing contracts").[14] And besides a general assertion that the case involved "similar issues of FERC's responsibilities to ensure 'just and reasonable' rates that are raised in [*PUD* and *PUC*]" (Pet. 18), petitioner provides no explanation for its one-sentence claim that "there is a conflict" (Pet. 16) between the court of appeals' decision in this case and *California ex rel. Lockyer* v. *FERC*, 383 F.3d 1006 (9th Cir. 2004), cert. denied, 127 S. Ct. 2972 (2007).

In addition, petitioner's claim that the Commission "abandon[ed]" its statutory duty to set a just and reasonable charge (Pet. 25-30) is unfounded. In 1998, the Commission examined the CTC tariff amendment, carefully considered and rejected petitioner's claims that the CTC tariff formula was not just and reasonable, and ultimately found the CTC tariff formula "reasonable" under the FPA. Pet. App. 273a-276a, 282a-283a. Likewise, petitioner's claim that the CTC is not based on costs (Pet. 27-29) is also incorrect. As the Commission found, the CTC formula was designed to "recover the revenues lost over the existing seven-year notice term, less an estimate of the market value of the released capacity and energy." Pet. App. 280a. In turn, the lost revenues in the CTC tariff formula were based on New England Power's previously-approved contract rates to

[14] Nor would there be any reason to hold this petition for a writ of certiorari in abeyance were the Court to grant review in *PUC* or *PUD*, because the court of appeals' claim preclusion holding would mean that any judgment the Court might reach in those cases could have no effect on this one.

petitioner. See *ibid.* Had petitioner thought that those existing cor ct rates were unreasonable, it "could have, and sh d have, filed a complaint under [FPA] Section 206 to decrease its rates" before it terminated its contract with New England Power. *Id.* at 164a & n.129 (citing Order No. 888-A, 62 Fed. Reg. at 12,427). Petitioner did not do so. And as the court of appeals stated: "There is nothing obviously unreasonable about framing a charge for contract termination that approximates, as of the time of termination, projected revenues promised by the buyer less projected avoided loss for the seller." *Id.* at 13a.[15]

4. In a single paragraph, petitioner asserts (Pet. 30) that the sheer size of the CTC in this case and the "devastating impact" it will have on its customers independently warrant this Court's review. As the court of appeals noted, however, the size of the present award is due in large measure to the fact that petitioner has at this point "managed to defer making the full installment payments for years." Pet. App. 13a. Although petitioner "is now faced with large past-due obligations[,] * * * the obligations are ones easily foreseen, have been enlarged by delays in payment and are the product

[15] The use of cost projections in setting rates is a common practice by the Commission. See, *e.g.*, 18 C.F.R. 35.13(d)(2) (estimated costs to be submitted as "Period II" data); see also *Indiana Mun. Elec. Ass'n* v. *FERC*, 629 F.2d 480, 483 (7th Cir. 1980) ("[I]f a utility always had to adjust its [cost] projections because of actual experience * * * the Commission would be forced to return to historic cost even though Congress did not so intend."); *Indiana & Mich. Mun. Distributors* v. *FERC*, 659 F.2d 1193, 1198 (D.C. Cir. 1981) ("[T]he Commission rightly does not require that history prove the accuracy of the utilities' estimates, but rather that the utility prove that the estimates were reasonable when made.").

of [petitioner's] own choices." *Ibid.* Further review is not warranted.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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AUGUST 2007

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IN THE

Supreme Court of the United States

OCTOBER TERM, 2007

TOWN OF NORWOOD, MASSACHUSETTS,
Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION
NEW ENGLAND POWER COMPANY,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

PETITIONER TOWN OF NORWOOD, MASSACHUSETTS, REPLY TO BRIEFS OF RESPONDENTS IN OPPOSITION

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I. *RES JUDICATA* DOES NOT JUSTIFY DENIAL OF THE WRIT

In its Petition Norwood demonstrated that a writ should issue to review the requirements of the Federal Power Act ("FPA")'s "just and reasonable" statutory provisions and the application of *res judicata*.[1] FERC's Opposition does not contest that FERC's ordered contract termination charge ("CTC") had to comply with the FPA's "just and reasonable" requirements (§§ 205-206, 16 U.S.C. §§ 824d-824e, Pet. App. 216a-223a), that under the Act sellers' costs are the main determinant of what is a "just and reasonable charge," or that New England Power Company ("NEP") suffered no or minimal costs from Norwood's service termination. It does not contest that FERC has recently been modifying its application of the "just and reasonable" provisions. FERC's main argument is that Norwood could have contested the CTC's justness and reasonableness in 1998 when FERC approved NEP's CTC tariff amendment filing. FERC thus argues that Norwood's claims are barred by *res judicata*.[2]

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[1] Abbreviations used herein are the same as those used in the Petition and in the Glossary, Pet. App. H.

[2] NEP's Opposition is likewise based on *res judicata*. NEP also argues that because the CTC was based on NEP's tariff rates before Norwood's termination, it must be considered "just and reasonable." NEP Opp. 19. Because NEP was selling its generating plant, which led to Norwood's contract termination, NEP's prior cost-of-service no longer had validity. NEP cannot and does not deny that by setting the CTC without taking into account the plant sales or the real market value of power, NEP charges Norwood for contract termination costs that NEP did not incur. NEP is correct that when NEP determined to restructure by selling its plant, Norwood challenged the restructuring and the applicability of the CTC to Norwood. Opp. 2-9. However, this other litigation did not establish the amount of the CTC or the validity of its components, both of which are at issue here. Finally, although NEP characterizes Norwood as not honoring its contract (Opp. 21), the issue here is the appropriate "just and reasonable" termination charge where Norwood ceased buying NEP wholesale power in the context of NEP's restructuring. The CTC tariff amendment provided for Norwood's contract termination. Pet. App. 280a.

FERC seeks to justify the first circuit affirmance of its orders, stating, "petitioner had been free in the original proceeding to argue 'that the tariff rates to be incorporated by the CTC were unreasonably high in light of what was known then about [New England Power's] costs' or otherwise to 'contest the CTC terms as unlawful....'" FERC Opp. 10, quoting *Town of Norwood v. FERC*, 476 F.3d 18, 26 (1st Cir. 2007), Pet. App. 1a-19a, 12a (brackets in original). Norwood could not have raised these issues in the original proceeding because FERC did not accept NEP's proposed CTC calculations for filing in that proceeding and did not consider the CTC components' justness and reasonableness. Pet. 6, 8-9.[3] FERC thus ignores the fact that it did not consider the CTC components or rates in the original proceeding and, in fact, set them for hearing in this case.

For *res judicata* to apply the prior action must allow consideration of the issue raised in the second case. Thus, the final judgment in both cases must be based upon the same cause of action. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 502 (2001). *Res judicata* is triggered where in the first case "'the merits of [a party's] claim are in fact adjudicated [for or] against the [party] after trial of the substantive issues.'" *Id.*, quoting Restatement (Second) of Judgments § 19 cmt. a, 161 (1982) (brackets in *Semtek*). Nor will prior decisions be binding unless "both parties had a full and fair opportunity to argue their version of the facts." *United States v. Utah Constr. & Mining Co.*, 384 U.S. 394, 422 (1966). In this case, in the first action FERC accepted NEP's CTC formula tariff filing as a "generic" matter (Pet. 7-8, Pet. App. 240a), but neither accepted for filing nor decided the reasonableness of NEP's proposed contract termination charge or whether the formula components were

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[3] NEP's Opp., at 11, states correctly that Norwood sought to challenge to CTC on "just and reasonable" grounds, but NEP states incorrectly that "Petitioner had a full opportunity" to do so. NEP Opp. 10. FERC refused to consider the issue. Pet. 6-7 n.6; Pet. App. 273a-274a.

"just and reasonable." Pet. 6, 8-9, Pet. App. 120a-121a. *Because these matters were not at issue, Norwood could not have contested whether the formula costs were excessive or whether the components were reasonable.*

Contrary to FERC's Opposition at 9 and the court of appeals' opinion, 476 F.3d at 24, Pet. App. 10a, which the Opposition quotes, the main thrust of Norwood's appeal is *not* that the CTC formula is "'unlawful under the statute.'" It is that FERC's *application* of the formula is illegal. Because FERC had refused to review the reasonableness of the CTC rate and components earlier, it was required to review the application of the formula in this case, including whether the Revenue, Market and cap components could be just and reasonable when NEP no longer owned the plant whose costs are included in the Revenue factor and when the actual, *known* market prices for power belie any claim that NEP had properly calculated market prices.[4]

The 1998 case decided only that Norwood could terminate wholesale power purchases from NEP subject to its paying a yet-to-be-determined contract termination charge in accordance with a general formula. *Town of Norwood v. FERC*, 202 F.3d 392, 400 (1st Cir. 2000), Pet. App. 231a-255a, 240a-241a. The issue here — whether NEP's CTC formula *application*, including its interpretation and implementation, is "just and reasonable" — is not the same as the issue in the 1998 FERC case and appeal — whether a departing NEP customer must pay any CTC. *In the 1998 case the justness and reasonableness of the charge and its application was neither allowed nor decided.*

Moreover, significantly, neither FERC nor NEP contest Norwood's citation of *Clark-Cowlitz Joint Operating Agency v. FERC*, 826 F.2d 1074 (D.C. Cir., 1987) (*en banc*) at Pet. 23 n.11, which denied preclusion in light of FERC's inherent ability to change policy and adjust to new facts and

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[4] FERC's statement in its Opposition, at 11 n.12, that Norwood is not raising these Revenue and Market factor claims is incorrect.

circumstances. *Accord, Port of Seattle, Wash. v. FERC*, No. 03-74139, slip op. at 10,426 (9th Cir. Aug. 24, 2007) ("*Port of Seattle*"). Even if there is an argument that *res judicata* could apply in these circumstances, certainly, FERC *could have considered* Norwood's claims that the CTC had to reflect NEP's sales of its generating plant that were used to serve Norwood and that market power rates were higher than the contract rate, especially where FERC had said that Norwood could later file a complaint to consider cost issues. Pet. App. 121a, 243a, 281a.[5] FERC's application of preclusion on the facts of this case was an abuse of discretion. *Motor Vehicle Mfrs. Ass'n of the United States v. State Farm Mut. Auto. Ins. Co.*, 463 U.S. 29, 48-49 (1983). Thus, in addition to raising questions for Court review as to the appropriate statutory scope of "just and reasonable" requirements, this case raises important issues as to the appropriate scope of *res judicata* and of agency discretion to apply or not to apply the doctrine.

There are at least ten separate reasons why Norwood was intended to have an effective, subsequent opportunity to challenge the CTC components and charge and why FERC could not have decided Norwood's issues in 1998.

First, when NEP filed its 1998 CTC tariff amendment, NEP proffered its proposed CTC calculations. Although FERC accepted the generic CTC tariff amendment, it did not accept

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[5] There is disagreement among the circuits as to the rigidness with which *res judicata* should be applied in the agency context. *See, e.g., Napier v. Dir.*, 999 F.2d 1032, 1037 & n.7 (6th Cir. 1993) (enforcement of preclusion in the agency context must be "tempered by fairness and equity, in accordance with the beneficent purposes of the [underlying statute]" and "[r]igid application of administrative *res judicata* is inappropriate ... when such application would [require agency action] in violation of equity and good conscience," citing *United States v. Smith*, 482 F.2d 1120, 1123 (8th Cir. 1973) and *Purter v. Heckler*, 771 F.2d 682, 691 (3d Cir. 1985), respectively); *see also Artukovic v. INS*, 693 F.2d 894, 898 (9th Cir. 1982) ("in the administrative law context, the principles of collateral estoppel and *res judicata* are applied flexibly").

or approve the calculations. Pet. 6, 8-9. FERC could not have properly held (and at the time did not hold) that Norwood was required to contest a rate that FERC had not accepted for filing.[6]

Second, FERC also did not "accept[] the individual components of the CTC calculation" nor "approve[] the individual components used in NEPCO's calculation of Norwood's CTC...." Pet. App. 121a. Not having ruled on the components (*e.g.*, the Revenue Factor, Market factor and cap) in the tariff case, FERC was required to do so in this case so *res judicata* cannot apply.

Third, Norwood sought to litigate the justness and reasonableness of the charge in the first proceeding. Pet. 6-7 n.6; NEP Opp. 11-12. FERC refused to set the CTC amount for hearing, but said that Norwood could file a subsequent complaint. Pet. 6 & n.6; Pet. App. 281a. The court of appeals affirmed, stating: "FERC suggested in its initial order that Norwood could file a section 206 complaint ... challenging the substance of the contract termination charge, ... and presumably it can still do so." Pet. App. 243a; Pet. 7.

Fourth, regulatory agencies constantly apply general tariff language in later cases to obtain rates appropriate to the circumstances. *See Panhandle E. Pipe Line Co. v. FERC*, 777 F.2d 739, 741-742, 746-48 (D.C. Cir. 1985) (regulations exception allowed in part due to imprudency).

Fifth, tariff language may not be applied to reach unjustifiable results. *Idaho Power Co. v. FERC*, 312 F.3d 454, 461-62 (D.C. Cir. 2002) (rejecting tariff provision interpretation that produced nonsensical result); *Fla. Mun. Power Agency v. FERC*, 411 F.3d 287 (D.C. Cir. 2005) (remanding refusal to consider customer-requested tariff rule

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[6] FERC's Opposition at 5, 6 emphasizes that Norwood estimated the CTC amount to be $78 million. Norwood certainly knew the amount that NEP claimed, but because FERC rejected NEP's attempt to file the amount, the amount was not before FERC and its validity *could not have been* at issue.

exception to charging for transmission for customer's entire load that the transmission provider could not provide). Because the CTC formula Revenue component includes the costs associated with NEP's generating plants (Pet. App. 25a, 60a; NEP Opp. 19), if NEP sells plant without reducing its Revenue factor, the CTC will include payment for plant which NEP has sold and has been paid.

Sixth, in approving the CTC, FERC left open an opportunity for Norwood to file a subsequent complaint. FERC concedes that there is an exception to *res judicata* where matters are left open for future adjudication. Opp. 12. It states that whether the matter at issue here was left open is a "factbound determination[]," but NEP shows no basis for concluding that the matter was not deferred. FERC Opp. 13.

Seventh, rejecting NEP's arguments, FERC set for hearing *in this case* the market value of the released Norwood power, the Revenue factor, the "fixed power supply costs relating to Norwood" and other cost issues. Pet. 8-9; Pet. App. 117a-119a (quotation at 118a), 120a-121a.[7] If these issues could not have been considered, there was no need for the hearing. Having set and held a full hearing as to the components and charge, FERC could not refuse to consider Norwood's contentions that the charge had no basis under the Act. *Port of Seattle*, slip op. at 10,418-19.

Eighth, although FERC maintains that issues involving the CTC's justness and reasonableness were decided at the time of NEP's filing, Order No. 888[8] (on which the CTC is based)

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[7] The Administrative Law Judge ("ALJ") found that a reduction to the R factor for plant sales was necessary "to ensure that the CTC charge is not unjust, unreasonable or unduly discriminatory as applied to Norwood." Initial Decision, *Town of Norwood v. Nat'l Grid USA*, 107 F.E.R.C. ¶ 63,041, P 62 (2005), Pet. App. 162a-163a. *Accord*, reducing the cap at PP 101-108, Pet. App. 187a-192a.

[8] Promoting Wholesale Competition Through Open Access Non-Discriminatory Transmission Services by Public Utilities; Recovery of Stranded Costs by Public Utilities and Transmitting Utilities, Order No. 888, 61 Fed. Reg. 21,539 (May 10, 1996), [1991–1996 Regs. Preambles]

established a general stranded cost formula, which FERC applied in individual cases. Pet. 20-21 n.10. Further, FERC's May 15, 1998 Order states, "In its answer, NEPCO argues, *inter alia,* that its proposed CTC is consistent with Order No. 888...." Pet. App. 279a.[9] In cases implementing Order No. 888, FERC allows changes to reflect subsequent events and to achieve a just charge. Pet. 20-21 n.10. Order No. 888 recognized seller obligations to reduce stranded costs for generation sales. Order No. 888 at 21,659-60, [1991–1996 Regs. Preambles] F.E.R.C. Stat. & Regs. at 31,841-42. Nonetheless, FERC made no adjustment for plant sales in this case and the court below affirmed.

Ninth, this is an FPA complaint proceeding *where FERC had held that it had not previously approved the formula components as just and reasonable.* Pet. App. 21a, 120a-121a. If necessary, FERC was obligated to apply or even change the formula *to ensure a just and reasonable charge.*

Tenth, at issue is plant that has been sold, yielding NEP revenues, not costs. The first circuit's holding that FERC's approval of the CTC general formula allowed a CTC payment for plant that had been profitably sold sanctions an arbitrary and capricious result. Administrative Procedure Act § 10(e), 5 U.S.C. § 706, Pet. App. 228a-229a.

F.E.R.C. Stat. & Regs. ¶ 31,036, *clarified,* 76 F.E.R.C. ¶ 61,009 (1996), *modified,* Order No. 888-A, 62 Fed. Reg. 12,274 (Mar. 14, 1997), [1996–2000 Regs. Preambles] F.E.R.C. Stat. & Regs. ¶ 31,048, *order on reh'g,* Order No. 888-B, 62 Fed. Reg. 64,688 (Dec. 9, 1997), 81 F.E.R.C. ¶ 61,248 (1997), *order on reh'g,* Order No. 888-C, 82 F.E.R.C. ¶ 61,046 (1998), *aff'd in part and remanded in part sub nom. Transmission Access Policy Study Group v. FERC,* 225 F.3d 667 (D.C. Cir. 2000), *aff'd sub nom. New York v. FERC,* 535 U.S. 1 (2002).

[9] Apart from terminology differences, the stranded costs and CTC formulas are virtually the same; the CTC formula comes from the stranded cost formula. Pet. App. 275a-276a, 69a. Order No. 888 at 21,572-73, [1991–1996 Regs. Preambles] F.E.R.C. Stat. & Regs. at 31,839-40.

Norwood did not have a "full and fair opportunity" to argue its version of the facts of whether the approximately $72 million FERC-ordered CTC payment plus interest was "just and reasonable" in the first proceeding. *Utah Constr. & Mining*, 384 U.S. at 422; *Semtek*, 531 U.S. at 502. Further, *res judicata* does not apply because FERC and the court of appeals left open Norwood's right to challenge the payment on "just and reasonable" grounds. Pet. 20-21. However, a respected court of appeals found Norwood's claims barred. *Town of Norwood*, 476 F.3d at 24-26, Pet. App. 8a-13a. Whether, to what extent and under what standards courts of appeals may determine that agencies may avoid substantive statutory law on grounds of *res judicata* in spite of agencies never having reviewed the statutory issues warrants this Court's review. NEP's Opp. 13-14 discussing the court of appeals' restrictive interpretation of its earlier 2000 *Town of Norwood* decision supports allowing an earlier, arguably ambiguous, decision to foreclose consideration of matters entrusted to agency decision, thus permitting uncertainty, non-enforcement of important Congressional mandates, denials of party rights and unnecessary litigation.

Finally, at the same time that they argue that FERC's 1998 orders bar Norwood from contesting the unjustness and unreasonableness of the amount of the charge, FERC (Opp. 14-15) and NEP (Opp. 19) state that Norwood could have filed a complaint against the legality of NEP's underlying tariff rate before it terminated purchasing from NEP. The appropriate charge was at issue in this case. And, as this case illustrates, FERC would not have been willing to hear a complaint by a departing customer protesting the costs of power that a buyer will not purchase from plant that a seller has sold. Page 1 n.2, *supra*.

II. THE FIRST CIRCUIT AND NINTH CIRCUIT DECISIONS CONFLICT

A series of Ninth Circuit cases, most recently *Port of Seattle*, slip op. at 10,411, decided August 24, 2007 after

Norwood's petition was filed, have held that *all* FERC jurisdictional rates and charges must be "just and reasonable." *Id.*; *Pub. Util. Dist. No. 1 of Snohomish County, Wash. v. FERC*, 471 F.3d 1053, 1057-59, 1074 (9th Cir. 2006), *petitions for cert. filed*, 75 U.S.L.W. 3610 (U.S. May 3, 2007) (Nos. 06-1457 and 06-1462) ("*P.U.D.*"); *Pub. Utils. Comm'n of the State of Cal. v. FERC*, 474 F.3d 587, 590 (9th Cir. 2006), *petitions for cert. filed*, 75 U.S.L.W. 3610 (U.S. May 3, 2007) (Nos. 06-1454 and 06-1468) ("*P.U.C.*"); *Cal. ex rel. Lockyer v. FERC*, 383 F.3d 1006, 1012-13 (9th Cir. 2004), *cert. denied*, 127 S. Ct. 2972 (2007) ("*Lockyer*"). These cases concern rates charged under contracts pursuant to *previously approved* market based rate tariffs or other market rate approvals. *Lockyer*, 383 F.3d at 1009; 1015; *P.U.D.*, 471 F.3d at 1056-57, 1073, 1077-85; *P.U.C.*, 474 F.3d at 591, 594. *See also Port of Seattle*, slip op. at 10,409-10, 10,411, 10,432-34 (concerning refunds for sales of capacity and energy generally under short-term, bilateral standard form power pool power contracts). The Ninth Circuit holds that when facts reveal that markets may have been subject to malfunction or manipulation, charges based on prior market rate authorizations must be reopened. *E.g.*, *Lockyer*, 383 F.3d at 1014-1018; *P.U.D.*, 471 F. 3d at 1077, 1085-87; *P.U.C.*, 474 F.3d at 595-96. Contrary to FERC's Opp., at 9, which states that the Ninth Circuit cases did not deal with preclusion, in *Lockyer* FERC itself (unsuccessfully) argued that petitioners were impermissibly attacking prior Commission orders approving sellers market-based tariffs.

The FERC Opp. at 13 treats the Ninth Circuit cases as "involv[ing] the reasonableness of rates under still-existing contracts." The cases, holding that prior approvals do not negate FERC's duty to ensure that rates are "just and reasonable," are in stark contrast with the First Circuit's affirmance of FERC's CTC on *res judicata* grounds because of its prior approval of the CTC tariff formula. The CTC tariff provision has no different legal status than the tariffs and prior FERC orders that were before the Ninth Circuit.

As *Lockyer* states: "If the ability to ... gauge the 'just and reasonable' nature of the [market-based tariff] rates is eliminated, then effective federal regulation is removed altogether." 383 F.3d at 1015. Finally, FERC argues (Opp. 12, 13-14) that unlike the rates before the Ninth Circuit, the CTC is a fixed formula charge.[10] Whether the CTC is deemed "fixed," a "rate" or a "charge," it provides for a $72 million payment plus interest that must be "just and reasonable."

CONCLUSION

The writ should be granted.

Respectfully submitted,

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[10] The Opposition makes much of its (and the court of appeals') contention that the CTC is a "'formula driven charge'" determined as of the time of contract termination. Ironically, formula rates typically adjust to cost and market changes. *E.g.*, *Ocean State Power II*, 69 F.E.R.C. ¶ 61,146, 61,545-46 (1994). However it is characterized, the CTC was required to meet the statutory test.